United States Court of Appeals for the Second Circuit



APPENDIX

75-76

In The

United States Court of Appeals

For The Second Circuit

KURT SCHMIEDER,

Plaintiff-Appellant,

FILED

VS.

LOUIS H. HALL, as executor of the estate of HELEN B. DWYER, deceased,

Defendant-Appellee.

On Appeal from the United States District Court, South OFTATES COURT OF District of New York.



Volume IV, 901a - End

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Attorney for Plaintiff-Appellant 450 Park Avenue New York, New York 10022 (212) 371-9040

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Rules of Civil Procedure, and for such other and further relief as may be just and equitable.

Dated: Lake Success, New York October 16, 1975 Berg and Duffy Attorneys for Plaintiff 3000 Marcus Avenue Lake Success, New York 11040 (516) 354 - 2500

TO: Messrs. Turchin & Topper 60 East 42nd Street New York, New York 10017

> Messrs. Martin, Obermaier & Morvillo 1290 Avenue of the Americas New York, New York 10019

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902a

AFFIDAVIT OF WERNER GALLESKI IN SUPPORT OF THE FOREGOING

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----X

KURT SCHMIEDER,

Plaintiff, 69 Civ. 1939 (WK)

-against-

AFFIDAVIT Of WERNER GALLESKI

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B. DWYER,

Defendant.

STATE OF NEW YORK)

(ss.:

COUNTY OF NASSAU)

WERNER GALLESKI, being duly sworn, says that:

I am the attorney of record for plaintiff in this action, and I make this affidavit in support of plaintiff's motion for reconsideration and other relief.

The court's opinion dated September 25, 1975, manifests a complete reversal of what plaintiff had understood to be the court's pre-judgment concept and appreciation of the theory of plaintiff's case. Therefore, I respectfully urge fundamental principles of fairness would be violated unless the court permits a rehearing and/or reargument of the relevant issues coupled with the introduction of additional evidence.

(A) The legal background common to the issues of

plaintiff's standing and the merits centers on these points:

- (I) The court's conclusions rest upon it equation of plaintiff's action with the unmade assertion of an equitable interest in the gift property dating from 1938. For more than six years, Mrs. Dwyer and the present defendant have construed plaintiff's cause of action to be predicated upon an allegation "that Mrs. Dwyer held the gift property in a constructive trust for his benefit" (See, e.g. Defendant's Post-Trial Reply Memorandum at 6). Plaintiff has contended, however, that the complaint is premised on the retention of the property which Mrs. Dwyer received from the Attorney General. Schmieder prayed for the remedial relief of impressing a constructive trust upon that property because the retention thereof would run contrary to the conscience of equity. Prior to the commencement of this action (by which plaintiff elected to sue for a constructive trust rather than in damages for fraud), there was no assertion of any equitable interest on the property on plaintiff's part.
- (II) By holding the plaintiff's statement (Defendant's Exhibit K-2) was a crucial piece of evidence in Mrs.

 Dwyer's lawsuit against the Attorney General, the court seems to equate the gentlemen's agreement testified to by plaintiff (Plaintiff's Exhibit 26-A, p 11) with a non absolute,

conditional transfer of the gift property. On the basis of the proof of Hall, Sr.'s professional and human integrity, however, such equation is not compelling. Hall, Sr. must rather be presumed to have been aware of the firmly established precedent making it a practical impossibility for an attorney (and those persons connected with him in connection with his practice of the law) to receive a bounty from a client. Pursuant to these decisions, Hall, Sr. must also be presumed to have known that even an absolute and unconditional transfer of the gift property to him or some person under his disability would be of no help. This presumption stands unrebutted.

Rather than assuming that plaintiff perjured himself when he testified as to a "gentlemen's agreement" governing the return of the "gift" property, it is more logical to assume that this was plaintiff's understanding of Hall, Sr.'s explanation of how equity would view a gift from a client to his attorney. Undoubtedly, plaintiff had every reason to expect that he was dealing with outstanding people who would abide by the conscience of equity and it is not inconcievable that he was so advised.

In addition to the case law previously cited by plaintiff, Hall, Sr. must have been aware of <u>Gardner v. Ogden</u>, 22

New York 327, 348, 350 (1860), which stresses the import of a

clerk having "access to the correspondence," and making every assistant subject to the disabilities of the principal. See also Poillon v. Rertz, 1 Sandford Ch. R. 569 (subjecting the clerk of an attorney to the attorney's disabilities.) Ford v. Harrington, 16 New York 285 (1857). This factor is further reinforced in the instant case because Hall, Sr. himself was the donee of the controlling power of appointment. His assistant Mrs. Dwyer was his appointee, and his son, Hall, Jr., likewise doubled up in factors of proximity as associate and later partner. In that regard, Hall, Sr. must have likewise been familiar with Lingke v. Wilkinson, 57 New York 445 (1874) which held that the relationship between the father trustee and the son purchaser of trust property, although standing alone was not sufficient to show fraud as a matter of law, was nevertheless pertinent to the question of fraud when taken together with the other circumstances.

(III) By holding that the settlement between Mrs. Dwyer and the Attorney General ultimately disposed of plaintiff's recent election to impress a constructive upon Mrs. Dwyer's retention of the property, the court equates the issue of cloaking, as the basis of the vesting order, and the present issue as to what the conscience of equity commands on these and the subsequent facts.

On the cloaking issue, Judge Holtzoff made his now famous statement with respect to Mrs. Dwyer's motion for summary judgment after reading her papers which included as part thereof plaintiff's statement dated June 1, 1948, alleging an absolute and unconditional transfer. Even with knowledge of this statement clearly before him, Judge Holtzoff was of the opinion that Mrs. Dwyer was clearly a straw. directly points the way to a concept of constructive fraud, as distinguished from outright fraud and deceit. Constructive fraud is a fraud of which equity takes cognizance without necessarily involving any evil or corrupt intention. The mere implication that the transaction in which its origin was conceived was inequitable invokes the doctrine. Jurisprudence, §137, at 192. Under Judge Holtzoff's view, which ultimately led to the settlement of Mrs. Dwyer's claim and the dismissal of her action with prejudice pursuant to a stipulation which did not form part of the court record (and which was never presented to the court to be "so ordered") it must be determined that the disability of the donee as aforesaid was sufficient to find a cloaking.

The conscience of equity issue in this action, on the other hand, deals with all the equities of the case on the basis of the constructive fraud, taking into account Mrs. Dwyer's ungraciousness and her passing a substantial

()

part of the property to Hall, Jr. one of the disabled parties to the 1938 transaction.

- (B) Plaintiff has standing to bring this action.
- (I) No right or interest of plaintiff was vested; at the time immediately preceding the vesting, plaintiff had no asset or claim in the United States. Defendant's claim that plaintiff's property was vested (Opinion at 2) is erroneous. It is undisputed that plaintiff had given up all right, title or interest in the gift property when he made the absolute and unconditional 1938 gift in accordance with Hall, Sr.'s advice that there should be "no strings attached". Vested was the property held by Mrs. Dwyer as listed in the Vesting Order on the ground that it was cloaked for plaintiff, in that it was controlled by plaintiff. Control is an economic term which has been introduced in order to reach cloaking where the enemy alien did not have legal ownership of the property and where no property is owed to him. In view of Dwyer's absolute title to the vested property, only the alternative of "control" by plaintiff can apply. Such cloaking covers situations where the alien holds no right in or to the property and where there is a factual propensity on the holder's part which creates the risk that he may deliver the property to the enemy alien.

Presently, such risk could be, and was by Judge Holtzoff, concluded from Hall Sr.'s and Mrs. Dwyer's disabilities in regard to the gift transaction combined with the obvious qualms of Mrs. Dwyer about some defective motivation of the (allegedly Swiss) donor which necessitated a TFR-Report.

Plaintiff had no fraud claim by the time of the vesting of Mrs. Dwyer's property. Hall, Sr. and Mrs. Dwyer had up to that time conducted themselves in a manner consistent with the most stringent commands of the conscience of equity.

Absent a fraud claim, plaintiff could at that time not have any remedial rights in aid thereof. In any event, it was not before 1969 that he exercised any procedural election toward a constructive trust. Even assuming the existence of a fraud claim prior to the Vesting Order, no constructive trust could be vested prior to plaintiff's election. Only after such election can a constructive trust become an asset susceptible of enemy property control. Stoehr v. Miller 296 F. 414, 426, 427 (2d Cir. 1923).

Venturing one further unconceded assumption, viz., the hypothesis that plaintiff had some claim or right against Mrs. Dwyer, such as a fraud claim, it would not be covered by the Vesting Order for the additional reason that the property vested by the Order is described in section 2 thereof. There

has not been, and there could not be, any global vesting of all undetermined assets owned or controlled by plaintiff in the United States of America. Such purported "conveyance" would run afoul of elementary exigencies of property law as to the definitness of the property conveyed. The prevailing principle of res vesting has been unmistakeably defined by Learned Hand, then District Judge at this Court in Kahn v. Garvan, 263 F.909, 913 (S.D.N.Y.1930): "....the capture went as far as it purported to go..... " This Court (Opinion at 10) emphasized these words at the end of section 2 of the Vesting Order: "held on behalf of or on account of" (plaintiff) in support of its holding that the Vesting Order terminated every interest of plaintiff in the property. Plaintiff respectfully disagrees to the extent that he denies any prevesting interest in the property since 1938. The vesting must have rested on "control" because all legal rights in or to the property had been transferred to Mrs. Dwyer. Immediately following the words emphasized by the court, the vesting order determined in the alternative that the property was "controlled by" plaintiff, which language names plaintiff as the beneficiary in the economic sense. The reasons stated as the basis for the vesting can not be used for a determination of the scope of the vested property.

Vested were everybody's rights, if any, in respect of the listed property. This is important to show that no interest of plaintiff was cut off (because it did not then exist) and particularly to dispel any speculation that the Vesting Order could first have created an interest of plaintiff and could then have cut it off.

No attempted departure from the res vesting requirement can be deducted from the caption of the Vesting Order (Opinion at 10); "Re: Stock owned by and owed to Kurt Schmieder." This is a general caption indicating who the benefitted enemy alien is, without strict legalistic distinction as to the legal or economic reasons for the vesting in a given case. It cannot be derogatory to the detailed wording at the end of Section 2 of the Vesting Order, which includes economic control by the enemy alien as an alternative.

- (II) Even if some rudimentary right for redress of equitable fraud had existed at the time of vesting, the present action would still not be cut off.
- A. The Trading with the Enemy Act does not contravene the law of equity.

Although the "law of the case" can be reversed (Opinion, No. 20), it is respectfully urged that Judge Frankel's decision denying Mrs. Dwyer's first motion in this case for dismissal of the complaint on its face correctly invoked the paramount power of

the conscience of equity. See plaintiff's memorandum in opposition to defendant's motion which specifically discussed the Trading with the Enemy Act and "windfall" aspects.

The Supreme Court, through Justice Black, ruled on the dominance of common law in disregard of ancient rules denying resident enemy aliens in the United States the access to American courts. Re Kawato, 317 U.S. 69, (1942). A brief filed by the Solicitor General, when the case was before the Circuit Court, referred to the legislative history and writings of the Assistant General who drafted the Act in favor of a dominance of the common law over the Act. Accordingly, the technical provisions of the Act are relegated to a purely mechanical status and cannot prevent the operation of the common law, presently the redress of inequities arising from fraud. In granting to resident enemy aliens the access to our courts, the Supreme Court also expressed a hostility of the common law toward a windfall: "If the public welfare demands that this alien shall not receive compensation...the government can make the decision without allowing a windfall to these claimants." Re Kawato, supra, at 74). Consequently, any technical cut-off is overcome by a present command of the conscience of equity.

B. The settlement between Mrs. Dwyer and the Attorney General did not work a technical cut-off of plaintiff's cause of action.

The settlement, in plaintiff's view, is neither a partial allowance of a title claim, nor a compromise on a vested claim originally held by plaintiff as pre-vesting owner, but agreement made between Mrs. Dwyer and the United States outside the administration of the fund. Under each of those alternatives there was no cut-off. An allowance of a title claim would have required a divesting. The opposite thereto, a dismissal of the action with prejudice, occurred pursuant to the settlement. If there had been a partial divesting, the Vesting Order would have been vacated in respect of the divested part, and no rights in respect of the divested part would have been cut off.

A settlement of a claim of the fund (such as for equitable fraud) against Mrs. Dwyer is out of the question because Mrs. Dwyer did not pay anything. The withdrawal of her title claim was neutral to the administration of the fund. Thus, Mrs. Dwyer cannot have been discharged from any obligations or duties under the present cause of action. This would have been null and void because it would have amounted to a blanket license releasing Mrs. Dwyer in respect of future equitable fraud.

The settlement can only be understood as an arrangement outside the administration of the fund. Mrs. Dwyer's receipt of unearmarked cash and securities was the price for her withdrawal of the title claim which did not affect the administration of the fund but the finances of the United States as

distributee. The Attorney General acted here not as "common-law trustee" under Section 12 of the Act in administering the fund, but as "trustee for the United States" in holding the net fund pending disposition thereof by Congress. This distinction between two types of functioning of the Custodian appears clearly from Munich Reinsurance Co. v. First Reinsurance Co. 6 F. 2d 751 (2d Cir. 1925):

"From the time the stock was seized and taken into the Custodian's possession, the title to the stock passed to the Custodian, and when the latter, as owner, sold it, the proceeds of the sale passed to the Custodian, as trustee for the United States, to be dealt with as the United States, as owner, might determine."*

Under the foregoing, Mrs. Dwyer has furnished a consideration to the United States as distributee, but not to the vested fund. This places the transaction outside the Act and precludes any cut-off thereunder.

Defendant

- C. PLAINTIFF IS ENTITLED TO IMPRESS A CONSTRUCTIVE TRUST ON THE PROPERTY HELD BY DEFENDANT.
- I. Plaintiff is Estopped From Contesting the Conclusiveness of the Vesting Order Determining Plaintiff's Control of the Property.

By reason of the dismassal of Mrs. Dwyer's Washington

^{*/} This portion of the opinion was curiously *mitted from quotations within defendant's trial memorandum at 22, and Post-Trial memorandum at 45.

action with prejudice, there is a <u>res judicata</u> effect apart from the estoppel (under I) and/or at least a collateral estoppel preventing defendant from denying that plaintiff was a beneficiary of the gift property in the economic sense. This creates a presumption in plainciff's favor as to the issue of undue influence.

II. Under the Facts Admitted by Defendant, Mrs. Dwyer was Subject to the Same Disability as Hall, Sr., in Receiving the Gift Property From the Plaintiff.

It is uncontested that Hall, Sr. was the attorney for the plaintiff and also acted on behalf of Mrs. Dwyer in the matter of the gift. Consequently, Hall, Sr., was a double agent to both parties of the gift transaction. In addition, Hall, Sr., played a certain role on his own by reason of the fact that, pursuant to Hall, Sr.'s, advice and instructions, plaintiff appointed Hall, Sr., as a party who should nominate the donee of the gift property. This made Hall, Sr., in effect an agent for three parties, including himself.

It is further uncontested that Mrs. Dwyer had access to the files and correspondence relating to plaintiff and to Stoneleigh Corporation which had been organized by Hall, Sr., pursuant to plaintiff's instructions. This brings Mrs. Dwyer into the class of employees which share with their principal the disability as to the receipt of a gift or even of a sale

from a client of the principal. Reference is made to the authorities cited under A.II.

III. Hall Himself Was a Transferee in Regard to His Power of Appointment and Mrs. Dwyer Received the Property Through Him Without Consideration.

him the power of appointment. This subjects him to the burden of proof as to undue influence (Opinion no. 30). His appointment of the property to Dwyer constitutes a gratuitous transfer which subjects Mrs. Dwyer and the defendant to a constructive trust regardless of Mrs. Dwyer's alleged innocence. 5 Scott on Trusts (3d Ed.) 510. However innocent Mrs. Dwyer may have been and regardless of whether the court shall hold that Mrs. Dwyer's position in the office was not of such a nature as to justify plaintiff to rely on her integrity, the conscience of equity already condemns the retention of the property by defendant on the ground alone that Mrs. Dwyer received the property from Hall, Sr., an original donee, without consideration.

- D. PLAINTIFF WOULD OFFER PROOF OF THE FOLLOWING ADDITIONAL FACTS AT A NEW TRIAL.
- The order dismissing Dwyer's action against the Attorney General with prejudice.
- 2. Hitler's rise to power in Germany was foreseeable by 1930, and the court requires more information concerning these events in order to draw interpretations and conclusions.

- 3. Evidence showing that Hall, Sr., and Hall, Jr., covered up the true nature of the transfer to Dwyer with regard to the identity of the donor (e.g., tax returns and the TFR report).
- 4. The entire transcript of Louis Hall, Jr.'s, deposition in the Surrogate's curt proceeding; or an opportunity to question Hall further about his knowledge of the facts surrounding the 1938 gift, Mrs. Dwyer's relationship to the gift, Mrs. Dwyer's relationship to her family and to Hall, Jr.'s, family, and to the families of his two sisters.
- 5. Plaintiff's eligibility as a group persecutee under Section 32 of the Trading With the Enemy Act, with application of the primary jurisdiction foctrine for the purpose of using, through administrative channels, the wealth of documentary evidence available to the Government at document centers in Germany in regard to the resistance group to which plaintiff belonged.

WHEREFORE, plaintiff respectfully requests that the court make new findings of fact and conclusions of law in accordance with the foregoing, and further that the court permit the admission of new evidence and apply the primary jurisdiction doctrine, and a new trial, if required.

Werner Galleski

Sworn to before me this 16th day of October 1975.

BRATRICE M. KARLES
Notary Public, State of New York
No. 30-2036600
Qualified in Nassau County

Term Expires Merch 30, 19 7 7

SOUTHERN DISTRICT OF NEW YORK KURT SCHMIEDER LOUIS ! . HALL, JR. NOTICE OF MOTION and AFFIDAVIT BERG AND DUFFY Attorneys for plaintiff Office and Post Office Address, Telephone 3000 Marcus Avenue LAKE SUCCESS, NEW YORK 11040 To Messrs. Turchin & Topper Anomey(s) for defendant

MICROFILM OCT 3 1 1975

THE GROUNDS THAT IS RULES OF GILL PROCEDURE

NOTICE OF MOTION FOR REARGUMENT OF DENIED MOTIONS UNDER

918a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

KURT SCHMIEDER.

Plaintiff.

-against-

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

NOTICE OF MOTION FOR REARGUMENT OF DENIED MOTION UNDER RULES 52 AND 59.

Civil Action No. 69 Civ. 1939 (WK)

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings
heretofore had herein and upon the order of this Court filed on October 31, 1975,
denying plaintiff's motion dated October 16, 1975, for an order amending the
court's findings of fact and conclusions of law as set forth in its opinion dated
September 25, 1975, and for an order granting plaintiff a new trial, a rehearing
or reconsideration, all pursuant to Rules 52 and 59, Federal Rules of Civil
Procedure, and for such other and further relief as may be just and equitable,
and upon the memorandum attached hereto, plaintiff will move this Court
before the Honorable Whitman Knapp, United States District Judge, Southern
District of New York, courtroom No. 1605 at 2 p.m. on the 21st day of

November, 1975, United States Courthouse, Foley Square, New York, for reargument of plaintiff's aforementioned motion under Rules 52 and 59 pursuant to Rule 9 (m) of the General Rules of this Court, and upon such reargument for a granting of plaintiff's aforementioned motion, and for such other and further relief as may be just and equitable.

Dated: New York, N.Y. November 10, 1975

> Werner Galleski Attorney for Plaintiff 450 Park Avenue New York, N.Y. 10022 Tel: 371 9040

TO: Messrs. Turchin & Topper Attorneys for Defendant 60 East 42 Street New York, New York, 10017

> Messrs. Martin; Obermaier & Morvillo Counsel to Defendant 1290 Avenue of the Americas New York, New York, 10019

Messrs. Berg & Duffy Counsel to Plaintiff 3000 Marcus Avenue Lake Success, New York, 11040

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
KURT SCHMIEDER,

Plaintiff,

69 Civ. 1939 (WK)

-against-

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LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B.DWYER,

Defendant.

OF MOTION FOR REARGUMENT.

A. Introduction.

The within diversity action prays for impression of a constructive trust upon defendant's assets primarily upon the theory that defendant's decedent, Helen B. Dwyer, received an absolute gift from plaint iff and was, (under the law applicable to gifts received by an attorney's executive assistant within the scope of the practice of law), equitably disabled from retaining the gift property after the emergency which had motivated the gift, had passed.

On October 6, 1975, judgment was issued and filed against the plaintiff dismissing the complaint.

B. Argument.

denied that motion as untimely and without merit.

POINT I : THE SERVICE OF THE MOTION WAS TIMELY.

Rule 59 (b) of the Federal Rules of Civil Procedure reads:

" (b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

In plaintiff's respectful submission this ten day time limit was preserved by means of the service of the motion on October 16, 1975, which was ten days after the entry of the judgment on October 6, 1975.

POINT II: THE MOTION WAS MERITORIOUS.

1. The Court's analysis of the evidence is based upon a number of factual assumptions which it apparently assumed to be notorious but which in fact were erroneous.

On page 17 of the opinion the Court treats plaintiff as a common tax cheat because he systematically evaded legitimate German property taxes in respect of his secret

American funds already in the early 1930s. The Court concludes that in those days of the Weimar Republic such criminal conduct cannot be explained by hostility to the Nazis. This conclusion must be understood in context of a finding on page 4 to the effect that the Nazis came into power in 1934.

Hitler's legal ascent to governmental power occurred on January 30, 1933 after a long organizational and political job which had begun with the founding of the party on April 1, 1920.

These notorious matters are detailed in the 1245 page volume entitled:

"The Rise and Fall of the Third Reich" by William L. Shirer, edited by

Simon & Schuster, New York, in 1960. Enclosed hereto are photographic excerpts therefrom to substantiate the most important elements which may guide the Court toward a finding that plaintiff, like millions of other Germans, considered Hitler and his movement as a danger to Germany and to the world at least from the time of the abortive "Beer Hall Putsch" in 1923. Very apparently, this Court is not aware of the feature of Hitler which Shirer describes as "unique among history's revolutionaries: He intended to make his revolution after achieving political power. There was to be no revolution to gain control of the State. That goal was to be reached by mandate of the voters or by the consent of the rulers of the nation - in short, by constitutional means." (page 135)

Since the Court clearly relied on sources outside the record in regard to developments in the Weimar Republic, the following copies are respectfully

submitted as Exhibits hereto, at this time not by means of full proof but merely to show that the present record is insufficient and that more evidence in support of plaintiff's position will be required. The copies so attached deal with the following:

Pages 50/51 Pages 68/69	The organization date of April 1, 1920 The abortive "Beer Hall Putsch"				
Pages 78/79	Hitler became a national figure and worked on "Mein Kampf" (which became the Nazi Bible) while serving time pursuant to his conviction				
Pages 117/120 and 138/139	The growth of the party from 1925 to 1931				
Page 141	The election success of 1930 convinced not only- millions of ordinary people but many leaders in business and in the Army that Hitler could perhaps not be stopped.				

The "unsatisfactory" character of plaintiff as a common tax cheat seemingly influenced other evidentiary evaluations made by the Court, such as:

- (a) The holding that plaintiff's 1948 statement was "a critical motivating factor in the government decision to settle the Dwyer law suit" (Opinion p ge 17, plaintiff's moving affidavit pages 2/4)
 - (b) The non-acceptance of plaintiff's testimony that the in effect absolute nature of the gift transaction still involved a gentlemen's agreement (Plaintiff's Exhibit 26-A page 11).

924a

- (c) The holding that plaintiff at the time of the gift, "was seeking to avoid..... the risk of being put to death upon discovery that he had been hiding foreign assets". This finding conflicts with plaintiff's succinct testimony (Exhibit 26-A pp. 44/5) about cumerous useful possibilities which were available to him in disposing of or investing his foreign funds. Also the Court erred in ignoring the statement of Dr. M. Magdalena Schoch, German law expert for the Government in the Dwyer law suit who certified under date of September 29, 1950 the following in opposition to Dwyer's motion for summary judgment. Plaintiff ".. was subject to the death penalty and the confiscation of his entire property as punishment for failure to report such holdings. It made no difference whether he kept the property or whether at some date subsequent to the Economic Sabotage Act he transferred it to someone else. In either case he incurred the same penalties."
- 2. Since the issues of plaintiff's standing and of the merits of his action are deeply rooted in equity, his qualification as a common tax cheat or as a resistance fighter and persecutee is of pervasive relevance to the whole case. The reason why these matters connected with the Nazi background were not more closely elaborated upon, was the concentration of the argument upon

the tentative conclusions formulated by the Court. It therefore is submitted that due process is violated if the denigrating classification of plaintiff as an "unsatisfactory" witness by reason of assumptions not contained in the record is maintained without exploration of the true facts.

C. Conclusion

Under the foregoing plaintiff respectfully requests reargument of his motion under Rules 52 and 59 to the effect that such motion was timely, that reargument be granted and that upon reargument relief as requested by plaintiff's motion dated October 16, 1975 be granted.

Respectfully submitted.

WERNER GALLESKI Attorney for Plaintiff

926a

MEMORANDUM DECISION AND ORDER OF KRAPP DESCON NOVEMBER 1975 DENYING MOTTON

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

- against -

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HULEN B. DWYER.

De fendant.

KNAPP. D.J.

Plaintiff correctly points out that the sourt in error in declaring plaintiff's motion for rearywagent to he been untimely. The court, however, adheres to its view th the motion is wholly without merit. The motion is, and denied.

SO CADERED.

Dated: New York, New York

Movember 12, 1975.

AFFIDAVIT OF WERNER GALLESKI IN SUPPORT OF PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)

UNITED ST	ATES	DIST	RIC	T CO	URT
SOUTHERN	DIST	RICT	OF	NEW	YORK

KURT SCHMIEDER,

Plaintiff,

- against -

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B. DWYER.

AFFIDAVIT

69 Civ. 1939

Defendant.

State and County of New York, SS .:

Werner Galleski being duly sworn, deposes and says:

I am the attorney of record for the plaintiff herein and make this affidavit in support of plaintiff's motion for relief from the judgment herein pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Judgment against the plaintiff was entered on October 6, 1975.

Findings of fact and conclusions of law were contained in the Opinion pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Plaintiff served a motion for a re-hearing etc. on October 16, which motion was denied by an order entered on October 31, 19° on the ground that the motion was untimely and without merit. Plaintiff's motion for reargument thereof was served on November 10, whereupon an order entered November 14, 1975 stated that the motion for rehearing etc. was timely but denied reargument on the merits. Accordingly, the

time to file an appeal from the judgment herein will expire on December 14, 1975.

I. Relief from the judgment is prayed for on the ground of some or all of the following: Mistake, Inadvertence, Surprise, or Excusable Neglect, pursuant to Rule 60(b)(1) This rule is invoked on the following grounds:

Without attacking the view laid down in note 20 of the Opinion, whereunder this Court is not cogently bound by the 'law of the case' as set forth in previous motion decisions, plaintiff's procedural conduct was not geared to the simultaneous switch on two separate issues and irreparable harm resulted therefrom. A letter of the Court dated July 3, 1975, had alerted the parties to the Court's tendency to review the issue of a cut-off of plaintiff's claim by the Vesting Order. But no warning was sounded in regard to the Court's departure from another pre-decided matter at the same time, viz., as to the scope of plaintiff's cause of action. In denying the deceased defendant's first motion to dismiss, Judge Frankel had decided that plaintiff's appeal to the conscience of equity invokes principles that are intrinsically open-ended and adaptable to the infinite varieties of conceiv ple 'fiduciary' relationship. Such conception of plaintiff's claim under the law of the case went far beyond the Opinion's crystallized issue of a conspiracy to defraud embarked upon and consummated in 1938 (Opinion 20).

By hindsight, a study of the transcript of the hearing shows a hidden dissent between the Court and plaintiff's counsel. After stating that much less than fraud or conspiracy could justify a finding in plaintiff's favor (T 351), plaintiff's counsel suggested that "the equitable conscience of this Court is going to act if it acts at all" (T 363). The Court agreed by saying "correct". The now obvious hidden dissent left it mutually unobserved that the Court exclusively referred to a cause of action for fraud completed in 1938 while plaintiff aimed at equitable or constructive fraud and completed when the (deceased / the present) defendant's retention of the gift became unconscionable in or after 1967.

Consequently, plaintiff's handling of the litigation was prejudiced by his mistaken belief that, if the court decided against him in respect of fraud consummated in 1938, the decision could still be favorable for plaintiff in respect of equitable fraud committed in 1967 or later.

In plaintiff's view, it would have been an overkill if he had succeeded upon the theory of an 1938 fraud. Basically, he aimed at a record showing equitable fraud committed subsequent to the emergency. Had he been aware of the 1938 fraud action as the only one before the Court, he would have buttressed plaintiff's prima facie case by further supporting proof.

Evidence which would suitably have been so introduced is the following (in addition to items set forth in earlier post-judgment motions):

- (a) Proof of the general political, psychological, financial, and moral climate in Central Europe during the thirties and thereafter during the Nazi spell furnishing the background to plaintiff's conduct in relation to the Dwyer gift and to his resistance activities testified to by him (Exh. 27A 22-36):
 - 1. Affidavit sworn to by George Crisan, the 14th day of November, 1975, picturing the general disrespect of governmental authority for the purpose of counter-acting present and future unlawful governmental intervention (Exhibit A, attached hereto).
 - 2. Copy fromNazi Conspiracy and Aggression, Opinion and Judgment, Office of United States Chief of Counsel for Fosecution of Axis Criminality. United States Government Printing Office, Washington: 1947, pp II, III, 4 through 35. (Exhibit B, attached hereto).
 - 3. Memo, Money and Banking, (revised), February 1945, prepared by the Board of Governors of the Federal Reserve System with the assistance of The Federal Reserve Bank of New York. (originally restricted) pp. VI and VII (Exhibit C, attached hereto).
 - 4. Germany, a modern history by Marshail Dill, Jr., New Edition Revised and enlarged, pp 327 through 364, (Exhibit D, attached hereto).

- 5. Florida State University Studies, Number Twenty,
 Verdict on Schacht, A Study in the Problem of Political "Guilt",
 by Eral R. Beck, Florida State University, Tallahassee, 1955,
 pp 114 through 135, (Exhibit E, attached hereto).
- 6. The Structure of the Nazi Economy, by Maxine Y.Sweezy,
 Instructor in Economics in Vassar Colleg, Cambridge, Massachusetts,
 Harvard University Press, 1941, Subtitle: Part for Harvard Studies
 in Monopoly and Competition, pp 238 and 239 (Exhibit F, attached
 hereto).
- (b) Proof of facilities which during the critical period were available to plaintiff for safe and riskless changes of his US investments. From 1934 to November 1938, I practiced as foreign exchange control specialist at Berlin, Germany, from the end of 1937 limited to Jewish clients in respect of their plans of emigration. On the basis of contacts from that period, I prepared the taking of expert evidence showing the practical continuation of the 1937 amnesty by curative repentance up to and beyond the outbreak of World War II. However, plaintiff was deterred by the cost of such proof. Plaintiff therefore proceeded without such proof pursuant to my advice that, even if plaintiff had been without any way-out other than making the gift to Dwyer, his action should prevail because the inescapability of the gift was diagnosed by Hall Sr. in the course of his practice of law,

because Dwyer had an "executive position partaking of the practice of law, and because Dwyer played an important part in the "execution" of Hall Sr's professional prescript.

On those grounds, I advised plaintiff to the effect that Dwyer and her estate should in equity not be permitted to hold on to the unjust enrichment procured through a participation in the practice of law.

- II. Relief from the judgment herein is also prayed for under Rule 60 (b) (4). In plaintiff's respectful submission, the judgment is void by reason of a violation of due process upon the following two separate and distinct grounds.

 In view of the manif estly extraordinary burden undertaken by the Court in its endeavor to penetrate into the multifold perplexities of the case at bar it hardly needs mentioning that the aftermentioned deficiencies of due process are found upon a purely objective test without implication of any shortcomings on the part of the Court.
 - (a) The misunderstanding as set forth under 1 hereof and the prejudice resulting therefrom have impaired plaintiff's conduct of the litigation herein to such a basic extent that due process is violated.
 - (b) In addition, the apparent fact that the Court considered the 1938 actual fraud claim as the only claim herein has the consequence that the judgment objectively suffers from an ambiguity making it uncertain to determine what has been adjudicated, thereby creating a need for multiple further litigation and thus hamperin the administration of due process

The objectively ambiguous points are these:

Does the judgment leave a gap so as to be restricted to the issues raised by the claim of a 1938 actual fraud? Or does it also cover the claim of an equitable fraud consummated in 1967 or later?

Is the cut-off of the claim by the Vesting Order also applicable to the claim of equitable fraud consummated in 1967 or later?

In particular, is it adjudicated that the said claim arose in 1938?

Or that it created a pre-vesting interest in the gift property for plaintiff's benefit?

As long as these matters are unsettled, plaintiff feels can pelled to commence a new action to cover the contingency that the judgment does not create any res judicata effect concerning the issue of equitable fraud perpetrated through retention of the fund in or after 1967. Furthermore, a potential ppeal from the instant judgment will, to protect the interest of the litigants, have to be somehow combined with any appeal from the judgment upon plaintiff's new action. In the alternative, either the said new action or the appeal from the judgment herein would have to be held in abeyance until the other is terminated.

There is a precedent in the Second Circuit providing for clarification in the District Court of matters technically not covered by Rule 60 (b) (l) where a non-clarification would be apt to impede due process.

934a

In Schildhaus v. Moe CA 2d 1964, 335, F2d 529, 531, Judge Friendly favored a correction of procedural complications (there through the handing down of a contrary Supreme Court decision eleven days after the judgment) in the District Court so as to simplify the litigation. The same substantial principle, it is respectfully urged, should presently apply in the interest of due process.

Werner Galleski

Sworn to before me this 1st day of December, 1975

Suplie Echlardt

John E ECKHARDY

Jotary Public, State of New York

No. 41-6143710

Quality of Carens County

The Carens County

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - AFFIDAVIT OF GEORGE CRISAN AFEIDAVIT

George Crisan of 6726 Fairwood Road, Hyattsville, Maryland, being duly sworn, deposes and says:

- 1.He is a citizen of the United States and a retired attorney for the Department of the Navy of the United States, before which he was an attorney with the General Services Administration; expert counsel (attorney) with the Foreign Claims Settlement Commission of the United States; and a Legal Analyst with the Law Library, Library of Congress.
- 2. He is a member of the Maryland bar, and was a member of the Rumanian bar from 1930 1948, practicing law in Arad, Rumania, and specializing in banking and financial law.
- 3. In the year 1938 conditions in Europe, with the take-over of the Government of Germany by the Nazi Party, and its announced intention of going to war to reunite German minorities, after taking over Austria (1938), that Europeans felt a need to preserve their foreign assets at all costs, despite laws, decrees and regulations of all European governments to the contrary.
- 4. In Germany especially the government, under the firm control of Hitler since 1933, pursued an economic policy directed toward war and the utilization of all German foreign exchange for the purpose of procuring war material. Many people at the time took whatever means they could, not only to save their assets, but also in attempt to help thwart Hitler's ambitions.
- 5. Rumania was a satellite nation in Hitler's war aims, but had decrees imposing severe penalties on persons secreting foreign assets and refusing to turn them over to the Government, but lawyers even assited people in keeping their property out of the Government hands. It was a situation of desperation, where, knowing war to be imminent, and the steps Hitler planned to take, everyone who opposed him and had the strength to do so took the law into his own hands in many respects.
- 6. Hitler's laws and decrees were so confiscatory that they were widely disregarded, even under the grave penalties. The Weimar Republic had been dead since 1933, long before 1938, and democracy no longer existed in Germany. In fact the Weimar Republic had been already extinguished by 1933 when Hitler came to power.

George Crisan

Subscribed and sworn to before me this 14th day of November 1975.

Notary Public.

FXHI-IT A

NAZI CONSPIRACY AND AGGRESSION

Opinion and Judgment

Office of United States Chief of Counsel for Prosecution of Axis Criminality



UNITED STATES GOVERNMENT PRINTING OFFICE WASHINGTON: 1947

OCT 1 3 '49

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The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics

-against-

Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer. Constantin von Neurath, and Hans Fritzsche, Individually and as Members of Any of the Following Groups or Organizations to Which They Respectively Belonged, Namely: Die Reichsregierung (Reich Cabinet); Das Korps Der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "SS") and including Die Sicherheitsdienst (commonly known as the "SD"); Die Geheime Staatspolizei (Secret State Police, commonly known as the "Gestapo"); Die Sturmabteilungen Der N. S. D. A. P. (commonly known as the "SA") and the General Staff and High Command of the German Armed Forces are as defined in Appendix B of the Indictment,

Defendants.

purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified

by military necessity.

"(c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts

performed by any persons in execution of such plan."

These provisions are binding upon the Tribunal as the law to be applied to the case. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts. For the purpose of showing the background of the aggressive war and war crimes charged in the indictment, the Tribunal will begin by reviewing some of the events that followed the First World War, and in particular, by tracing the growth of the Nazi Party under Hitler's leader-ship to a position of supreme power from which it controlled the destiny of the whole German people, and paved the way for the alleged commission of all the crimes charged against the defendants.

II. THE NAZI REGIME IN GERMANY

(A) THE ORIGIN AND ALLIS OF THE NAZI PARTY

On 5 January 1919, not 2 months after the conclusion of the Armistice which ended the First World War, and 6 months before the signing of the peace treaties at Versailles, there came into being in Germany a small political party called the German Labor Party. On the 12th September 1919, Adolf Hitler became a member of this party, and at the first public meeting held in Munich, on 24 February 1920, he announced the party's program. That program, which remained unaltered until the party was dissolved in 1945, consisted of 25 points, of which the following 5 are of particular interest on account of the light they throw on the matters with which the Tribunal is concerned:

"Point 1. We demand the unification of all Germans in the Greater Germany, on the basis of the right of self-determination of peoples.

"Point 2. We demand equality of rights for the German people in respect to the other nations; abrogation of the peace treaties of Versailles and St. Germain.

"Point 3. We demand land and territory for the sustenance of

our people, and the colonization of our surplus population.

"Point 4. Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race . . .

"Point 22. We demand abolition of the mercenary troops and formation of a national army."

Of these aims, the one which seems to have been regarded as the most important, and which figured in almost every public speech, was the removal of the "disgrace" of the Armistice, and the restrictions of the peace treaties of Versailles and St. Germain. In a typical speech at Munich on the 13th April 1923, for example, Hitler said with regard to the Treaty of Versailles:

"The treaty was made in order to bring twenty million Germans to their deaths, and to ruin the German nation . . . At its foundation our movement formulated three demands.

"1. Setting aside of the Peace Treaty.

"2. Unification of all Germans.

"3. Land and soil to feed our nation."

The demand for the unification of all Germans in the Greater Germany was to play a large part in the events preceding the seizure of Austria and Czechoslovakia; the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government; the demand for land was to be the justification for the acquisition of "living space" at the expense of other nations; the expulsion of the Jews from membership of the race of German blood was to lead to the atrocities against the Jewish people; and the demand for a national army was to result in measures of rearmament on the largest possible scale, and ultimately to war.

On the 29th July 1921, the party which had changed its name to National Sozialistische Deutsche Arbeiter Partei (NSI AP) was reorganized, Hitler becoming the first "Chairman." It was in this year that the Sturmabteilung or SA was founded, with Hitler at its head, as a private paramilitary force, which allegedly was to be used for the purpose of protecting NSDAP leaders from attack by rival political parties, and preserving order at NSDAP meetings, but in reality was used for fighting political opponents on the streets. In March 1923, the defendant Goering was appointed head of the SA.

The procedure within the party was governed in the most absolute way by the "leadership principle" (Fuehrerprinzip).

ainister, or decree, subject to no control of any kind and at his aplete discretion, subject only to the orders he received from above. This principle applied in the first instance to Hitler himself as leader of the party, and in a lesser degree to all other party of als. All members of the party swore an eath of "eternal alleace" to the leader.

There were only two ways in which Germany could achieve the three in aims above-mentioned—by negotiation or by force. The 25 nts of the NSDAP program do not specifically mention the thods on which the leaders of the party proposed to rely, but the tory of the Nazi regime shows that Hitler and his followers were y prepared to negotiate on the terms that their demands were con-

ed, and that force would be used if they were not.

In the night of the 8th November 1923, an abortive putsch took ce in Munich. Hitler and some of his followers burst into a meet-; in the Buergerbraeu Cellar, which was being addressed by the varian Prime Minister Kahr, with the intention of obtaining from n a decision to march forthwith on Berlin. On the morning of the 1 November, however, no Bavarian support was forthcoming, and tler's demonstration was met by the armed norces of the Reichswehr I the police. Only a few volleys were fired; and after a dozen of followers had been killed, Hitler fled for his life, and the demonation was over. The defendants Streicher, Frick, and Hess all took rt in the attempted rising. Hitler was later tried for high treason, d was convicted and sentenced to imprisonment. The SA was outved. Hitler was released from prison in 1924 and in 1925 the hutzstaffel, or SS, was created, nominally to act as his personal dyguard, but in reality to terrorize political opponents. This was to the year of the publication of "Mein Kampf", containing the litical views and aims of Hitler, which came to be regarded as the thentic source of Nazi doctrine.

(B) THE SEIZURE OF POWER

In the 8 years that followed the publication of "Mein Kampf", the 3DAP greatly extended its activities throughout Germany, paying rticular attention to the training of youth in the ideas of National cialism. The first Nazi youth organization had come into existence 1922, but it was in 1925 that the Hitler Jugend was officially recogzed by the NSDAP. In 1931 Ealdur von Schirach, who had joined e NSDAP in 1925, became Reich youth leader of the NSDAP. The party exerted every effort to win political support from the erman people. Elections were contested both for the Reichstag and e Landtage. The NSDAP leaders did not make any serious attempt hide the fact that their only purpose in entering German political

Republic, and to substitute for it a National Socialist totalitarian regime which would enable them to carry out their avowed policies without opposition. In preparation for the day when he would obtain power in Germany, Hitler in January 1929 appointed Heinrich Himmler as Reichsfuehrer SS with the special task of building the SS into a strong but elite group which would be dependable in all circumstances.

On the 30th January 1933, Hitler succeeded in being appointed Chancellor of the Reich by President von Hindenburg. The defendants Goering, Schacht, and von Papen were active in enlisting support to bring this about. Von Papen had been appointed Reich Chancellor on the 1st June 1932. On the 14th June he rescinded the decree of the Bruening Cabinet of the 13th April 1932, which had dissolved the Nazi paramilitary organizations, including the SA and SS. This was done by agreement between Hitler and von Papen, although von Papen denies that it was agreed as carly as the 28th May, as Dr. Hans Volz asserts in "Dates from the History of the NSDAP"; but that it was the result of an agreement was admitted in evidence by von Papen.

The Reichstag elections of the 31st July 1932 resulted in a great accession of strength to the NSDAP, and von Papen offered Hitler the post of Vice Chancellor, which he refused, insisting upon the Chancellorship itself. In November 1932 a petition signed by leading industrialists and financiers was presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler; and in the collection of signatures to the petition Schacht took a prominent

The election of the 6th November, which followed the defeat of the Government, reduced the number of NSDAP members, but von Papen made further efforts to gain Hitler's participation, without success. On the 12th November Schacht wrote to Hitler:

"I have no doubt that the present development of things can only lead to your becoming Chancellor. It seems as if our attempt to collect a number of signatures from business circles for this purpose was not altogether in vain * * * "

After Hitler's refusal of the 16th November, von Papen resigned, and was succeeded by General von Schleicher; but von Papen still continued his activities. He met Hitler at the house of the Cologne banker von Schroeder on the 4th January 1933, and attended a meeting at the defendant Ribbentrop's house on the 22d January, with the defendant Goering and others. He also had an interview with President Hindenburg on the 9th January, and from the 22d January onward he discussed officially with Hindenburg the formation of a Hitler Cabinet.

er held his first Cabinet meeting on the day of his appointment ancellor, at which the defendants Goering, Frick, Funk, von th, and von Papen were present in their official capacities. On th February 1983, the Reichstag building in Berlin was set on This fire was used by Hitler and his Cabinet as a pretext for g on the same day a decree suspending the constitutional atees of freedem. The decree was signed by President Hindenand countersigned by Hitler and the defendant Frick, who then ied the post of Reich Minister of the Interior. On the 5th March, ons were held, in which the NSDAP obtained 288 seats of the of 647. The Hitler Cabinet was anxious to pass an "Enabling that would give them full legislative powers, including the to deviate from the constitution. They were without the necesnajority in the Reichstag to be able to do this constitutionally. therefore made use of the decree suspending the guarantees of om and took into so-called protective custody a large number mmunist deputies and party officials. Having done this, Hitler luced the "Enabling Act" into the Reichstag, and after he had it clear that if it was not passed, further forceful measures would sen, the act was passed on the 24th March 1933.

(C) THE COMMUNICATION OF POWER

e NSDAP, having achieved power in this way, now proceeded tend its hold on every phase of German life. Other political partere prescented, their property and assets confiscated, and many eir members placed in concentration camps. On 26 April 1933, efendant Goering founded in Prussia the Geheime Staatspolizei, estapo as a secret police, and confided to the deputy leader of the apo that its main task was to eliminate political opponents of onal Socialism and Hitler. On the 14th July 1933, a law was ad declaring the NSDAP to be the only political party, and makteriminal to maintain or form any other political party.

order to place the complete control of the machinery of Governin the hands of the Nazi leaders, a series of laws and decrees were ed which reduced the powers of regional and local governments ughout Germany, transforming them into subordinate divisions he Government of the Reich. Representative assemblies in the ider were abolished, and with them all local elections. The Government then proceeded to secure control of the Civil Service. This achieved by a process of centralization, and by a careful sifting he whole Civil Service administration. By a law of the 7th April as provided that officials "who were of non-Aryan descent" should etired; and it was also decreed that "officials who because of their rious political activity do not offer security that they will exert neelves for the national state without reservation shall be dis-

charged." The law of the 11th April 1933 provided for the discharge of "all Civil Servants who belong to the Communist Party." Similarly, the Judiciary was subjected to control. Judges were removed from the bench for political or racial reasons. They were spied upon and made subject to the strongest pressure to join the Nazi Party as an alternative to being dismissed. When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly established "People's Court," consisting of two judges and five officials of the party. Special courts were set up to try political crimes and only party members were a pointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the judges were without power to intervene in any way. Pardons were granted to members of the party who had been sentenced by the judges for proved offenses. In 1935 several officials of the Hohenstein concentration camp were convicted of inflicting brutal treatment upon the inmates. High Nazi officials tried to influence the court, and after the officials had been convicted, Hitler pardoned them all. In 1942 "Judges' letters" were sent to all German judges by the Government, instructing them as to the "general lines" that they must follow.

In their determination to remove all sources of opposition, the NSDAP leaders furned their attention to the trade unions, the churches, and the Jews. In April 1933 Hitler ordered the late defendant Lev, who was then staff director of the political organization of the NSDAP, "to take over the trade unions." Most of the trade unions of Germany were joined together in two large federations, the "Free Trade Unions" and the "Christian Trade Unions." Unions outside these two large federations contained only 15 percent of the total union membership. On the 21st April 1933, Ley issued an NSDAP directive announcing a "coordination action" to be carried out on the 2nd May against the Free Trade Unions. The directive ordered that SA and SS men were to be employed in the planned "occupation of trade union properties and for the taking into protective custody of personalities who some into question." At the conclusion of the action the official NSDAP press service reported that the National Socialist Factory Cells Organization had "eliminated the old leadership of Free Trade Unions" and taken over the leadership themselves. Similarly, on the 3d May 1933, the NSDAP press service announced that the Christian trade unions "have unconditionally subordinated themselves to the leadership of Adolf Hitler." In place of the trade unions the Nazi Government set up a Deutsche Arbeits Front (DAF), controlled by the NSDAP, and which, in practice, all workers in Germany were compelled to join. The chairmen of the unions were taken into custody and were subjected to ill-treatment, ranging from assault and battery to murder.

their effort to combat the influence of the Christian churches, e doctrines were fundamentally at variance with National Social-hilosophy and practice, the Nazi Government proceeded more by. The extreme step of banning the practice of the Christian ion was not taken, but year by year efforts were made to limit affuence of Christianity on the German people, since, in the s used by the defendant Bormann to the defendant Rosenberg a official letter, "The Christian religion and National Socialist ines are not compatible." In the month of June 1941, the denut Bormann issued a secret decree on the relation of Christianity National Socialism. The Borne stated that:

"For the first time in German history the Fuehrer consciously and completely has the leadership in his own hand. With the party, its components and attached units, the Fuehrer has created for himself and thereby the German Reich leadership, an intrument which makes him independent of the treaty " ". Hore and more the people must be separated from the churches and their organs, the pastor " ". Never again must an influence on hadership of the people be yielded to the churches. This influence must be broken completely and finally. Only the leich Government and by its direction the party, its components and attached units, have a right to leadership of the people."

om the earliest days of the NSDAP, anti-Semitism had occupied minent place in national socialist thought and propaganda. The who were considered to have no right to German citizenship, held to have been largely responsible for the troubles with which ation was afflicted following on the war of 1914-18. Furtherthe antipathy to the Jews was intensified by the insistence which aid upon the superiority of the Germanic race and blood. The i chape of book 1 of "Mein Kampf" is dedicated to what may led the "Master Race" theory, the doctrine of Aryan superiority all other races, and the right of Germans in virtue of this surity to dominate and use other peoples for their own ends With ming of the Nazis into power in 1933, persecution of the Jews ie official state policy. On the 1st April, 1933, a boycott of h enterprises was approved by the Nazi Reich Cabinet, and g the following years a series of anti-Semitic laws were passed, cting the activities of Jews in the Civil Service, in the legal ssion, in journalism, and in the armed forces. In September the so-called Nurnberg Laws were passed, the most important of which was to deprive Jews of German citizenship. In this he influence of Jewish elements on the affairs of Germany was uished, and one more potential source of opposition to Nazi was rendered powerless.

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In any consideration of the crushing of opposition, the massacre of the 30th June 1934 must not be forgotten. It has become known as the "Roehm Purge" or "the blood bath," and revealed the methods which Hitler and his immediate associates, including the defendant Goering, were ready to employ to strike down all opposition and consolidate their power. On that day Roehm, the Chief of Staff of the SA since 1931, was murdered by Hitler's orders, and the "Old Guard" of the SA was massacred without trial and without warning. The opportunity was taken to murder a large number of people who at one time or another had opposed Hitler.

The ostensible ground for the murder of Roehm was that he was plotting to overthrow Hitler, and the defendant Goering gave evidence that knowledge of such a plot had come to his ears. Whether this

was so or not it is not necessary to determine.

On July 3rd the Cabinet approved Hitler's action and described it

as "legitimate self-defense by the State."

Shortly afterwards Hindenburg died, and Hitler became both Reich President and Chancellor. At the Nazi-dominated Plebiscite, which followed, 38 million Germans expressed their approval, and with the Reichswehr taking the oath of allegiance to the Fuehrer, full power was now in Hitler's hands.

Germany had accepted the Dictatorship with all its methods of

terror and its cynical and open denial of the rule of law.

Apart from the policy of crushing the potential opponents of their regime, the Nazi Government took active steps to increase its power over the German population. In the field of education everything was done to ensure that the youth of Germany was brought up in the atmosphere of National Socialism and accepted National Socialist teachings. Asearly as the 7th April 1933 the law reorganizing the Civil Service had made it possible for the Nazi Government to remove all "subversive and unreliable teachers"; and this was followed by numerous other measures to make sure that the schools were staffed by teachers who could be trusted to teach their pupils the full meaning of the National Socialist creed. Apart from the influence of National Socialist teaching in the schools, the Hitler Youth Organization was also relied upon by the Nazi Leaders for obtaining fanatical support from the younger generation. The defendant von Schirach, who had been Reich Youth Leader of the NSDAP since 1931, was appointed Youth Leader of the German Reich in June 1933. Soon all the youth organizations had been either dissolved or absorbed by the Hitler Youth, with the exception of the Catholic Youth. The Hitler Youth was organized on strict military lines, and as early as 1933 the Wehrmacht was cooperating in providing premilita training for the Reich Youth

The Nazi Government endeavored to unite the Nation in support of their policies through the extensive use of propaganda. A number

encies were set up whose duty was to control and influence the , radio, films, publishing firms, etc., in Germany, and to superentertainment and cultural and artistic activities. All these ries came under Goebbels' Ministry of the People's Enlightenment Propaganda, which together with a corresponding organization e NSDAP and the Reich Chamber of Culture, was ultimately unsible for exercising this supervision. The defendant Rosenplayed a leading part in disseminating the National Socialist ines on behalf of the Party, and the defendant Fritzsche, in conion with Goebbels, performed the same task for the State.

e greatest emphasis was laid on the supreme mission of the ian people to lead and dominate by virtue of their Nordic blood racial purity; and the ground was thus being prepared for the

tance of the idea of German world supremacy.

rough the effective control of the radio and the press, the Gerpeople, during the years which followed 1933, were subjected to lost intensive propaganda in furtherance of the regime. Hostile ism, indeed criticism of any kind, was forbidden, and the severest lities were imposed on those who indulged in it.

dependent judgment, based on freedom of thought, was rendered

impossible.

(D) MEASURES OF RE-ARMAMENT

iring the years immediately following Hitler's appointment as acellor, the Nazi Government set about reorganizing the ecoic life of Germany, and in particular the armament industry. was done on a vast scale and with extreme thoroughness.

was necessary to lay a secure financial foundation for the building maments, and in April 1936, the defendant Goering was appointed dinator for raw materials and foreign exchange, and empowered upervise all state and party activities in these fields. In this city he brought together the War Minister, the Minister of Ecoics, the Reich Finance Minister, the President of the Reichsbank, the Prussian Finance Minister to discuss problems connected with mobilization, and on the 27th May 1936, in addressing these , Goering opposed any financial limitation of war production and ed that "all measures are to be considered from the standpoint of assured waging of war." At the Party Rally in Nurnberg in 3, Hitler announced the establishment of the Four-Year Plan and appointment of Goering as the Plenipotentiary in charge. ring was already engage ' in building a strong air force and on the July 1938, he announced to a number of leading German aircraft sufacturers that the German Air Force was already superior in lity and quantity to the English. On the 14th October 1938, at ther conference, Goering announced that Hitler had instructed him to organize a gigantic armament program, which would make insignificant all previous achievements. He said that he had been ordered to build as rapidly as possible an air force five times as large as originally planned, to increase the speed of the rearmament of the navy and army, and to concentrate on offensive weapons, principally heavy artillery and heavy tanks. He then laid down a specific program designed to accomplish these ends. The extent to which rearmament had been accomplished was stated by Hitler in his memorandum of 9 October 1939, after the campaign in Poland. He said:

"The military application of our people's strength has been carried through to such an extent that within a short time at any rate it cannot be markedly improved upon by any manner of effort . . .

"The warlike equipment of the German people is at present larger in quantity and better in quality for a greater number of German divisions than in the year 1914. The weapons themselves, taking a substantial cross-section, are more modern than is the case of any other country in the world at this time. They have just proved their supreme war worthiness in their victorious campaign . . . There is no evidence available to show that any country in the world disposes of a better total ammunition stock than the Reich . . . The A. A. artillery is not equalled by any country in the world."

In this reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to cooperate, and to play its part in the rearmament program. In April 1933, Gustav Krupp von Bohlen submitted to Hitler on behalf of the Reich Association of German Industry a plan for the reorganization of German industry, which he stated was characterized by the desire to coordinate economic measures and political necessity. In the plan itself, Krupp stated that, "The turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time." What Krupp meant by this statement is fully shown by the draft text of a speech which he planned to deliver in the University of Berlin in January 1944, though the speech was in fact never delivered. Referring to the years 1919 to 1933, Krupp wrote: "It is the one great merit of the entire German war economy that it did not remain idle during those bad years, even though its activity could not be brought to light, for obvious reasons. Through years of secret work, scientifie and basic groundwork was laid in order to be ready again to work for the German armed forces at the appointed hour, without loss of time or experience . . . Only through the secret activity of German enterprise together with the experience gained meanwhile through production of peacetime goods,

was it possible after 1933 to fall into step with the new tasks arrived

at, restoring Germany's military power."

In October 1933, Germany withdrew from the International Disarmament Conference and League of Nations. In 1935 the Nazi Government decided to take the first open steps to free itself from its obligations under the Treaty of Versailles. On the 10th March 1935, the defendant Goering announced that Germany was building a military air force. Six days later, on the 16th March 1935, a law was passed bearing the signatures, among others, of the defendants Goering, Hess, Frank, Frick, Schacht, and von Neurath, instituting compulsory military service and fixing the establishment of the German Army at a peacetime strength of 500,000 mer In an endeavor . to reassure public opinion in other countries, the Government announced on the 21st May 1935, that German- would, though renouncing the disarmament clauses, still respect the territorial limitations of the Versailles Treaty, and would comply with the Locarno Pacts. Nevertheless, on the very day of this announcement, the secret Reich Defense Law was passed and its publication forbidden by Hitler. In this law, the powers and duties of the Chancellor and other Ministers were defined, should Germany become involved in war. It is clear from this law that by May of 1935 Hitler and his Government had arrived at the stage in the carrying out of their policies when it was necessary for them to have in existence the requisite machinery for the administration and government of Germany in the event of their policy leading to war.

At the same time that this preparation of the German economy for war was being carried out, the German armed forces themselves were

preparing for a rebuilding of Germany's armed strength.

The German Navy was particularly active in this regard. The official German naval historians, Assmann and Gladisch, admit that the Treaty of Versailles had only been in force for a new months before it was violated, particularly in the construction of a new submarine arm.

The publications of Captain Schuessler and Colonel Scherff, both of which were sponsored by the defendant Raeder, were designed to show the German people the nature of the Navy's effort to rearm in defiance of the Treaty of Versailles.

The full details of these publications have been given in evidence. On the 12th May 1934, the defendant Raeder issued the Top Secret armament plan for what was called the Third Armament Phase.

This contained the sentence:

"All theoretical and practical A-preparations are to be drawn up with a primary view to readiness for a war without any alert period."

One month later, in June 1934, the defendant Raeder had a conversation with Hitler in which Hitler instructed him to keep secret the construction of U-boats and of warships over the limit of 10,000 tons which was then being undertaken.

and on the 2d November 1934, the defendant Raeder had another con assistion with Hitler and the defendant Goering, in which Hitler and the the considered it vital that the German Navy "should be increased as planned, as no war could be carried on if the Navy was

not able to safeguard the ore imports from Scandinavia."

The large orders for building given in 1933 and 1934 are sought to be excused by the defendant Raeder on the ground that negotiations were in progress for an agreement between Germany and Great Britain permitting Germany to build ships in excess of the provisions of the Treaty of Versailles. This agreement, which was signed in 1935, restricted the German Navy to a tonnage equal to one-third of that of the British, except in respect of U-boats where 45 percent was agreed, subject always to the right to exceed this proportion after first informing the British Government and giving them an opportunity of discussion.

The Anglo-German Treaty followed in 1937, under which both Powers bound themselves to notify full details of their building program at least 4 months before any action was taken.

It is admitted that these clauses were not adhered to by Germany. In capital vessels, for example, the displacement details were falsified by 20 percent, whilst in the case of U-boats, the German historians Assmanh and Gladisch say:

"It is probably just in the sphere of submarine construction that Germany adhered the least to the restrictions of the German-British Treaty.".

The importance of these breaches of the Treaty is seen when the motive for this rearmament is considered. In the year 1940 the defendant Raeder himself wrote:

"The Fuehrer hoped until the last moment to be able to put off the threatening conflict with England until 1944-5. At that time, the Navy would have had available a fleet with a powerful U-boat superiority, and a much more favorable ratio as regards strength in all other types of ships, particularly those designed for warfare on the high seas."

The Nazi Government, as already stated, announced on the 21st May 1935, their intention to respect the territorial limitations of the Treaty of Versailles. On the 7th March, 1936, in defiance of that Treaty, the demilitarized zone of the Rhineland was entered by German troops. In announcing this action to German Reichstag, Hitler endeavored to justify the reentry by references to the recently concluded alliances between France and the Soviet Union, and between Czechoslovakia and the Soviet Union. He also tried to meet the

hostile reaction which he no doubt expected to follow this violation of the Treaty by saying:

"We have no territorial claims to make in Europe."

III. THE COMMON PLAN OF CONSPIRACY AND AGGRESSIVE WAR

The Tribunal now turns to the consideration of the crimes against peace charged in the indictment. Count one of the indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count two of the indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together, and to deal later in this judgment with the question of the individual responsibility of the defendants.

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the

belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the indictment is the war against Poland begun on the

1st September 1939.

Before examining that charge it is necessary to look more closely at some of the events which preceded those acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan.

For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign

policy.

From the beginning, the National Socialist movement claimed that its object was to unite the German people in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Fuehrer.

For its achievement, two things were deemed to be essential: The disruption of the European order as it had existed since the Treaty

of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories.

War was seen to be inevitable, or at the very least, highly probable if these purposes were to be accomplished. The German people, therefore, with all their resources, were to be organized as a great political-military army, schooled to obey without question any policy decreed by the State.

(A) PREPARATION FOR AGGRESSION

In "Mein Kampf" Hitler had made this view quite plain. It must be remembered that "Mein Kampf" was no mere private diary in which the secret thoughts of Hitler were set down. Its contents were rather proclaimed from the house tops. It was used in the schools and universities and among the Hitler Youth, in the SS and the SA, and among the German people generally, even down to the presentation of an official copy to all newly married people. By the year 1945 over 6½ million copies had been circulated. The general contents are well known. Over and over again Hitler asserted his belief in the necessity of force as the means of solving international problems, as in the following quotation:

"The soil on which we now live was not a gift bestowed by Heaven on our forefathers. They had to conquer it by risking their lives. So also in the future, our people will not obtain territory, and therewith the means of existence, as a favor from any other people, but will have to win it by the power of a triumphant sword."

"Mein Kampf" contains many such passages, and the extolling of force as an instrument of foreign policy is openly proclaimed.

The precise objectives of this policy of force are also set forth in detail. The very first page of the book asserts that "German-Austria must be restored to the great German Motherland," not on economic grounds, but because "people of the same blood should be in the same Reich."

The restoration of the German frontiers of 1914 is declared to be wholly insufficient, and if Germany is to exist at all, it must be as a world power with the necessary territorial magnitude.

"Mein Kampf" is quite explicit in stating where the increased territory is to be found:

"Therefore we National Socialists have purposely drawn a line through the line of conduct followed by pre ar Germany in foreign policy. We put an end to the perpetual Germanic march towards the south and west of Europe, and turn our eyes towards the lands of the east. We finally put a stop to the colonial and trade policy of the prewar times, and pass over to the territorial policy of the future.

"But when we speak of new territory in Europe today, we must think principally of Russia and the border states subject to her."

"Mein Kampf" is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification.

Its importance lies in the unmistakable attitude of aggression revealed throughout its pages.

(B) The Planning of Accression

Evidence from captured documents has revealed that Hitler held four secret meetings to which the Tribunal proposes to make special reference because of the light they shed upon the question of the common plan and aggressive war.

These meetings took place on the 5th November 1027, the 23d of May 1939, the 22d of August 1939, and the 23d of November 1939.

At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms.

The documents which record what took place at these meetings have been subject to some criticism at the hands of defending counsel.

Their essential authenticity is not denied, but it is said, for example, that they do not propose to be verbatim transcripts of the speeches they record, that the document dealing with the meeting on the 5th November 1937, was dated 5 days after the meeting had taken place, and that the two documents dealing with the meeting of August 22, 1939 differ from one another, and are unsigned.

Lighing the fullest allowance for criticism of this kind, the Tribunal is of the opinion that the documents are documents of the highest value, and that their authenticity and substantial truth are established.

They are obviously careful records of the events they describe, and they have been preserved as such in the archives of the German Government, from whose custody they were captured. Such documents could never be dismissed as inventions, nor even as inaccurate or distorted; they plainly record events which actually took place.

(C) Conferences of the 23rd November 1939 and 5th November 1937

It will perhaps be useful to deal first of all with the meeting of the 23d November 1939, when Hitler called his supreme commanders together. A record was made of what was said, by one of these present. At the date of the meeting, Austria and Czechoslovakia had been incorporated into the German Reich, Poland had been conquered by the German armies, and the war with Great Britain and France was still in its static phase. The moment was opportune for a review of past events. Hitler informed the commanders that the purpose of the con-

ference was to give them an idea of the world of his thoughts, and to tell them his decision. He thereupon reviewed his political task since 1919, and referred to the secession of Germany from the League of Nations, the denunciation of the Disarmament Conference, the order for rearmament, the introduction of compulsory armed service, the occupation of the Rhineland, the seizure of Austria, and the action against Czechoslovakia. He stated:

"One year later, Austria came; this step also was considered doubtful. It brought about a considerable reinforcement of the Reich. The next step was Bohemia, Moravia, and Poland. This step also was not possible to accomplish in one campaign. First of all, the western fortification had to be finished. It was not possible to reach the goal in one effort. It was clear to me from the first moment that I could not be satisfied with the Sudeten German territory. That was only a partial solution. The decision to march into Bohemia was made. Then followed the erection of the Protectorate and with that the basis for the action against Poland was laid, but I wasn't quite clear at that time whether I should start first against the east and then in the west or vice versa . . . Basically I did not organize the armed forces in order not to strike. The decision to strike was always in me. Earlier or later I wanted to solve the problem. Under pressure it was decided that the east was to be attacked first."

This address, reviewing past events and reaffirming the aggressive intentions present from the beginning, puts beyond any question of doubt the character of the actions against Austria and Czechoslovakia, and the war against Poland.

For they had all been accomplished according to plan; and the nature of that plan must now be examined in a little more detail.

At the meeting of the 23d November 1929, Hitler was locking back to things accomplished; at the earlier meetings now to be considered, he was looking forward, and revealing his plans to his confederates. The comparison is instructive.

The meeting held at the Reich Chancellery in Berlin on the 5th November 1937 was attended by Lieutenant Colonel Hossbach, Hitler's personal adjutant, who compiled a long note of the proceedings, which he dated the 10th November 1937 and signed.

The persons present were Hitler, and the defendants Goering, von Neurath, and Raeder, in their capacities as Commander in Chief of the Luftwaffe, Reich Foreign Minister, and Commander in Chief of the Navy respectively, General von Blomberg, Minister of War, and General von Fritsch, the Commander in Chief of the Army.

Hitler began by saying that the subject of the conference was of such high importance that in other States it would have taken place before the Cabinet. He went on to say that the subject matter of his speech was the result of his detailed deliberations, and of his experiences during his 4½ years of government. He requested that the statements he was about to make should be looked upon in the case of his death as his last will and testament. Hitler's main theme was the problem of living space, and he discussed various possible solutions, only to set them aside. He then said that the seizure of living space on the continent of Europe was therefore necessary, expressing himself in these words:

"It is not a case of conquering people but of conquering agriculturally useful space. It would also be more to the purpose to seek raw material producing territory in Europe directly adjoining the Reich and not overseas, and this solution would have to be brought into effect for one or two generations...

The history of all times—Roman Empire, British Empire—has proved that every space expansion can only be effected by breaking resistance and taking risks. Even set-backs are unavoidable; neither formerly nor today has space been found without an owner; the attacker always comes up against the proprietor."

He concluded with this observation:

"The question for Cermany is where the greatest possible conquest could be made at the lowest cost."

Nothing could indicate more plainly the aggressive intentions of Hitler, and the events which soon followed showed the reality of his purpose. It is impossible to accept the contention that Hitler did not actually mean war; for after pointing out that Germany might expect the opposition of England and France, and analyzing the strength and the weakness of those powers in particular situations, he continued:

"The German question can be solved only by way of force, and this is never without risk . . . If we place the decision to apply force with risk at the head of the following expositions, then we are left to reply to the questions 'when' and 'how'. In this regard we have to decide upon three different cases."

The first of these three cases set forth a hypothetical international situation, in which he would take action not later than 1943 to 1945, saying:

"If the Fuehrer is still living then it will be his irrevocable decision to solve the German space problem not later than 1943 to 1945. The necessity for action before 1943 to 1945 will come under consideration in cases 2 and 3."

The second and third cases to which Hitler referred show the plain intention to seize Austria and Czechoslovakia, and in this connection Hitler said:

"For the improvement of our military-political position, it must be our first aim in every case of entanglement by war to conquer Czechoslovakia and Austria simultaneously in order to remove any threat from the flanks in case of a possible advance westwards."

He further added:

"The annexation of the two States to Germany militarily and politically would constitute a considerable relief, owing to shorter and better frontiers, the freeing of fighting personnel for other purposes, and the possibility or reconstituting new armies up to a strength of about twelve divisions."

This decision to seize Austria and Czechoslovakia was discussed in some detail; the action was to be taken as soon as a favorable opportunity presented itself.

The military strength which Germany had been building up since 1933 was now to be directed at the two specific countries, Austria and

Czechoslovakia.

The defendant Goering testified that he did not believe at that time that Hitler actually meant to attack Austria and Czechoslovakia, and that the purpose of the conference was only to put pressure on von

Fritsch to speed up the rearmament of the Army.

The defendant Raeder testified that neither he, nor von Fritsch, nor von Blomberg, believed that Hitler actually meant war, a conviction which the defendant Raeder claims that he held up to the 22d August 1939. The basis of this conviction was his hope that Hitler would obtain a "political solution" of Germany's problems. But all that this means, when examined, is the belief that Germany's position would be so good, and Germany's armed might so overwhelming. that the territory desired could be obtained without fighting for it. It must be remembered too that Hitler's declared intention with regard to Austria was actually carried out within a little over 4 months from the date of the meeting, and within less than a year the first portion of Czechoslovakia was absorbed, and Bohemia and Moravia a few months later. If any doubts had existed in the minds of any of his hearers in November 1937, after March of 1939 there could no longer be any question that Hitler was in deadly carnest in his decision to resort to war. The Tribunal is satisfied that Lieutenant Colonel Hossbach's account of the meeting is substantially correct, and that those present knew that Austria and Czechosiovakia would be annexed by Germany at the first possible opportunity.

(D) THE SEIZURE OF AUSTRIA

The invasion of Austria was a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries.

As a result Germany's flank was protected, that of Czechoslovakia being greatly weakened. The first step had been taken in the seizure of "Lebensraum"; many new divisions of trained fighting men had been acquired; and with the seizure of foreign exchange reserves the

rearmament program had been greatly strengthened.

On the 21st May 1935 Hitler announced in the Reichstag that Germany did not intend either to attack Austria or to interfere in her internal affairs. On the 1st May 1936 he publicly coupled Czechoslovakia with Austria in his avowal of peaceful intentions; and so late as the 11th July 1936 he recognized by treaty the full sovereignty of Austria.

Austria was in fact seized by Germany in the month of March 1938. For a number of years before that date the National Socialists in Germany had been cooperating with the National Socialists of Austria with the ultimate object of incorporating Austria into the German Reich. The Putsch of July 25, 1934, which resulted in the assassination of Chancellor Dollfuss, had the seizure of Austria its object; but the Putsch failed, with the consequence that the National Socialist Party was outlawed in Austria. On the 11th July 1936 an agreement was entered into between the two countries, article 1 of which stated:

"The German Government recognizes the full sovereignty of the Federated State of Austria in the spirit of the presouncements of the German Fuehrer and Chancellor of the 21st May 1935."

Article 2 declared:

"Each of the two Government's regards the inner political order (including the question of American National Socialism) obtaining in the other country as an internal affair of the other country, upon which it will exercise neither direct nor indirect influence."

The National Socialist movement in Austria, however, continued its illegal activities under cover of secrecy; and the National Socialists of Germany gave the party active support. The resulting "incidents" were seized upon by the German National Socialists as an excuse for interfering in Austrian affairs. After the conference of the 5th November 1937 these "incidents" rapidly multiplied. The relationship between the two countries steadily worsened, and finally the Austrian Chancellor Schuschnigg was persuaded by the defendant von Papen and others to seek a conference with Hitler, which took place at Berchtesgaden on the 12th February 1938. The defendant Keitel was present at the conference, and Dr. Schuschnigg was threatened by Hitler with an immediate invasion of Austria. Schuschnigg finally agreed to grant a political amnesty to various Nazis convicted of crime, and to appoint the Nazi Seyss-Inquart as Minister of the Interior and Security with control of the police. On the 9th March

1938, in an attempt to preserve the independence of his country, Dr. Schuschnigg decided to hold a plebescite on the question of Austrian independence, which was fixed for the 13th March 1938. Hitler, 2 days later, sent an ultimatum to Schuschnigg that the plebescite must be withdrawn. In the afternoon and evening of the 11th March 1938 the defendant Goering made a series of demands upon the Austrian Government, each backed up by the threat of invasion. After Schuschnigg had agreed to the cancellation of the plebiscite another demand was put forward that Schuschnigg must resign, and that the defendant Seyss-Inquart should be appointed Chancellor. In consequence Schuschnigg resigned, and President Miklas, after at first refusing to appoint Seyss-Inquart as Chancellor, gave way and appointed him.

Meanwhile Hitler had given the final order for the German troops to cross the border at down on the 12th of March and instructed Seyss-Inquart to use formations of Austrian National Socialists to depose Miklas and to seize control of the Austrian Government. After the order to march had been given to the German troops, Goering telephoned the German Embassy in Vienna and dictated a telegram in which he wished Seyss-Inquart to send to Hitler to justify the mili-

tary action which had already been ordered. It was:

"The provisional Austrian Government, which, after the dismissal of the Schuschnigg Government, considers its task to establish peace and order in Austria, sends to the German Government the urgent request to support it in its task and to help it to prevent bloodshed. For this purpose it asks the German Government to send German troops as soon as possible."

Keppler, an official of the German Embassy, replied:

"Well, SA and SS are marching through the streets, but everything is quiet."

After some further discussion, Goering stated:

"Please show him (Seyss-Inquart) the text of the telegram, and do tell him that we are asking him—well, he doesn't even have to send the telegram. All he needs to do is to say 'Agreed'."

Seyss-Inquart never sent the telegram; he never even telegraphed, "Agreed."

It appears that as soon as he was appointed Chancellor, some time after 10 p. m., he called Keppler and told him to call up Hitler and transmit his protests against the occupation. This action outraged the defendant Goering, because "it would disturb the rest of the Fuehrer, who wanted to go to Austria the next day." At 11:15 p. m. an official in the Ministry of Propaganda in Berlin telephoned the German Embassy in Vienna and was told by Keppler: "Tell the General Field Marshal that Seyss-Inquart agrees."

At daybreak on the 12th March 1938, German troops marched into Austria, and met with no resistance. It was announced in the German press that Seyss-Inquart had been appointed the successor to Schuschnigg, and the telegram which Goering had suggested, but which was never sent, was quoted to show that Seyss-Inquart had requested the presence of German troops to prevent disorder. On the 13th March 1938, a law was passed for the reunion of Austria in the German Reich. Seyss-Inquart demanded that President Miklas should sign this law, but he refused to do so, and resigned his office. He was succeeded by Seyss-Inquart, who signed the law in the name of Austria. This law was then adopted as a law of the Reich by a Reich Cabinet decree issued the same day, and signed by Hitler and the defendants Goering, Frick, von Ribbentrop, and Hess.

It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that

in the result the object was achieved without bloodshed.

These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. Moreover, none of these considerations appear from the Hossbach account of the meetings of the 5th November 1937, to have been the motives which actuated Hitler; on the contrary, all the emphasis is there laid on the advantage to be gained by Germany in her military strength by the annexation of Austria.

(E) THE SEIZURE OF CZECHOSLOVARIA

The conference of the 5th November 1937, made it quite plain that the seizure of Czechoslovakia by Germany had been definitely decided upon. The only question remaining was the selection of the suitable moment to do it. On the 4th March 1938, the defendant von Ribbentrop wrote to the defendant Keitel with regard to a suggestion made to von Ribbentrop by the Hungarian Ambassador in Berlin, that possible war aims against Czechoslovakia should be discussed between the German and Hungarian armies. In the course of this letter von Ribbentrop said:

"I have many doubts about such negotiations. In case we should discuss with Hungary possible war aims against Czechoslovakia, the danger exists that other parties as well would be informed about this."

On the 11th March 1938, Goering made two separate statements to M. Mastny, the Czechoslovak Minister in Berlin, assuring him that

the developments then taking place in Austria would in no way have any detrimental influence on the relations between the German Reich and Czechoslovakia, and emphasized the continued earnest endeavor on the part of the Germans to improve those mutual relations. On the 12th March, Goering asked M. Mastny to call on him, and repeated these assurances.

This design to keep Czechoslovakia quiet whilst Austria was absorbed was a typical maneuver on the part of the defendant Goering, which he was to repeat later in the case of Poland, when he made the most strenuous efforts to isolate Poland in the impending struggle. On the same day, the 12th March, the defendant von Neurath spoke with M. Mastny, and assured him on behalf of Hitler that Germany still considered herself bound by the German-Czechoslovak arbitration convention concluded at Locarno in October 1925.

The evidence shows that after the occupation of Austria by the German Army on the 12th March, and the annexation of Austria on the 13th March, Conrad Henlein, who was the leader of the Sudeten German Party in Czechoslovakia, saw Hitler in Berlin on the 28th March. On the following day, at a conference in Berlin, when von Ribbentrop was present with Henlein, the general situation was discussed, and later the defendant Jodl recorded in his diary:

"After the annountion of Austria the Fuehrer mentions that there is no hurry to solve the Czech question, because Austria has to be digested first. Nevertheless, preparations for Case Gruen (that is, the plan against Czechoslovakia) will have to be carried out energetically; they will have to be newly prepared on the basis of the changed strategic position because of the annexation of Austria."

On the 21st April 1938, a discussion took place between Hitler and the defendant Keitel with regard to "Case Gruen", showing quite clearly that the preparations for the attack on Czechoslovakia were being fully considered. On the 28th May 1938, Hitler ordered that preparations should be made for military action against Czechoslovakia by the 2d October, and from then onwards the plan to in the Czechoslovakia was constantly under review. On the 30th May 1938 a directive signed by Hitler declared his "unalterable decision to smash Czechoslovakia by military action in the near future."

In June 1938, as appears from a captured document taken from the files of the SD in Berlin, an elaborate plan for the employment of the SD in Czechoslovakia had been proposed. This plan provided that "the SD follow, if possible, immediately after the leading troops, and take upon themselves the duties similar to their tasks in Germany..."

Gestapo officials were assigned to cooperate with the SD in certain operations. Special agents were to be trained beforehand to prevent

sabotage, and these agents were to be notified "before the attack in de time . . . in order to give them the possibility to hide themselve avoid arrest and deportation . . ."

"At the beginning, guerilla or partisan warfare is to be ex pected, therefore weapons are necessary . . . "

Files of information were to be compiled with notations as follows "To arrest" . . . "To liquidate" . . . "To confiscate" . . . "To de prive of passport", etc.

The plan provided for the temporary division of the country into larger and smaller territorial units, and considered various "suggestions", as they were termed, for the incorporation into the German Reich of the inhabitants and districts of Czechoslovakia. The final "suggestion" included the whole country, together with Slovakia and Carpathian Russia, with a populati a of nearly 15 millions.

The plan was modified in some respects in September after the Munich Conference, but the fact that the plan existed in such exact detail and was couched in such war-like language indicated a calculated design to resort to force.

. On the 31st August 1938, Hitler approved a memorandum by Jodl dated 24th August 1938, concerning the timing of the order for the invasion of Czechoslovakia and the question of defense measures. This memorandum contained the following:

"Operation Gruen will be set in motion by means of an 'incident' in Czechoslovakia, which will give Germany provocation for military intervention. The fixing of the exact time for this incident is of the utmost importance."

These facts demonstrate that the occupation of Czechoslovakia had

been planned in detail long before the hunich conference.

In the month of September 1938, the conferences and talks with military leaders continued. In view of the extraordinarily critical situation which had arisen, the British Prime Minister, Mr. Chamberlain, flew to Munich and then went to Berchtesgaden to see Hitler. On the 22d September Mr. Chamberlain met Hitler for further discussions at Bad Godesberg. On the 26th September 1938, Hitler said in a speech in Berlin, with reference to his conversation:

"I assured him, moreover, and I repeat it here, that when this problem is solved there will be no more territorial problems for Germany in Europe; and I further assured him that from the ent when Czechoslovakia solves its other problems, that is to say, when the Czechs have come to an arrangement, with their other minorities, peacefully and without oppression, I will be no longer interested in the Czech State, and that as far as I am concerned I will guarantee it. We don't want any Czechs."

On the 29th September 1938, after a conference between Ricler and holini and the British and French Prime Ministers in Munich, the Munich Pact was signed, by which Czechoslovakia was required to acquiesce in the cession of the Sudetenland to Germany. The "piece of paper' which the British Prime Minister brought back to London, signed by himself and Hitler, expressed the hope that for the future Britain and Germany might live without war. That Hitler never intended to adhere to the Munich Agreement is shown by the fact that a little later he asked the defendant Keitel for information with regard to the military force which in his opinion would be required to break all Czech resistance in Bohemia and Moravia. Keitel gave his reply on the 11th October 1938. On the 21st October 1938, a directive was issued by Hitler, and countersigned by the defendant Keitel, to the armed forces on their future tasks, which stated:

"Liquidation of the remainder of Czechoslovakia. It must be possible to smash at any time the remainder of Czechoslovakia if her policy should become hostile to Germany."

On the 14th March 1939, the Czech President Hacha and his Foreign Minister Chvalkovsky came to Berlin at the suggestion of Hitler, and attended a meeting at which the defendants von Ribbentrop, Goering, and Keitel were present, with others. The proposal was made to Hacha that if he would sign an agreement consenting to the corporation of the Czech people in the German Reich at once Bohemia and Moravia would be saved from destruction. He was informed that German troops had already received orders to march and that any resistance would be broken with physical force. The defendant Gering added the threat that he would destroy Prague completely from air. Faced by this desadful alternative, Hacha and his Foreign Minister put their signature to the necessary agreement at 4:30 in the morning, and Hitler and Ribbentrop signed on behalf of Germany.

On the 15th March, German troops occupied Bohemia and Moravia, and on the 16th March the German decree was issued incorporating Bohemia and Moravia into the Reich as a protectorate, and this decree was signed by the defendants von Ribbentrop and Frick.

(F) THE AGGRESSION AGAINST POLAND

By March 1939 the plan to annex Austria and Czechoslovakia, which had been discussed by Hitler at the meeting of the 5th November 1937, had been accomplished. The time had now come for the German leaders to consider further acts of aggression, made more possible of attainment because of that accomplishment.

On the 23d May 1939, a meeting was held in Hitler's study in the new Reich Chancellery in Berlin. Hitler announced his decision to attack Poland and gave his reasons, and discussed the effect the decision might have on other untries. In point of time, this was the second of the important meetings to which reference has already been made, and in order to appreciate the full significance of what was said and done, it is necessary to state shortly some of the main events in the history of German-Polish relations.

As long ago as the year 1925 an Arbitration Treaty between Germany and Poland had been made at Locarno, providing for the settlement of all disputes between the two countries. On the 26th January 1934, a German-Polish declaration of nonaggression was made, signed on behalf of the German Government by the defendant von Newath. On the 30th January 1934, and again on the 30th January 1937, Hitler made speeches in the Reichstag in which he expressed his view that Poland and Germany could work together in harmony and peace. On the 20th February 1938, Hitler made a third speech in the Reichstag in the course of which he said with regard to Poland:

"And so the way to a friendly understanding has been successfully paved, an understanding which, beginning with Danzig, has today, in spite of the attempts of certain mischief makers, succeeded in finally taking the poison out of the relations between Germany and Poland and transforming them into a sincere, friendly cooperation. Pelying on her friendships, Germany will not leave a stone unturned to save that ideal which provides the foundation for the task which is ahead of us—peace."

On the 26th September 1938, in the middle of the crisis over the Sudetenland, Hitler made the speech in Berlin which has already been quoted, and an an ed that 'e had informed the British Prime Minister that when the Czechoslovakian problem was solved there would be no more territorial problems for Germany in Europe. Nevertheless, on the 24th November of the same year, an OKW directive was issued to the German armed forces to make preparations for an attack upon Danzig; it stated:

"The Fuehrer has ordered: (1) Preparations are also to be made to enable the Free State of Danzig to be occupied by German troops by surprise."

In spite of having ordered military preparations for the occupation of Danzig, Hitler, on the 30th January 1939, said in a speech in the Reichstag:

"During the troubled months of the past year, the friendship between Germany and Poland has been one of the reassuring factors in the political life of Europe."

Five days previously, on the 25th January 1939, von Ribbentrop said in the course of a speech in Warsaw:

"Thus Poland and Germany can look forward to the future with full confidence in the solid basis of their mutual relations."

Following the occupation of Bohemia and Moravia by Germany on the 15th March 1939, which was a flagrant breach of the Munich Agreement, Great Britain gave an assurance to Poland on the 31st March 1939, that in the event of any action which clearly threatened Polish independence, and which the Polish Government accordingly considered it vital to resist with their national forces, Great Britain would feel itself bound at once to lend Poland all the support in its power. The French Government took the same stand. It is interesting to note in this connection, that one of the arguments frequently presented by the defense in the present case is that the defendants were induced to think that their conduct was not in breach of international law by the acquiescence of other powers. The declarations of Great Britain and France showed, at least, that this view could be held no longer.

On the 3d April 1939, a revised OKW directive was issued to the armed forces, which after referring to the question of Danzig made reference to Fall Weiss (the military code name for the German in-

vasion of Poland) and stated:

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"The Fuehrer has added the following directions to Fall Weiss:

(1) Preparations must be made in such a way that the operation can be carried out at any time from the 1st September 1939 onwards.

(2) The High Command of the Armed Forces has been directed to draw up a precise timetable for Fall Weiss and to arrange by conferences the synchronized timings between the three branches of the Armed Forces."

On the 11th April 1939, a further directive was signed by Hitler and issued to the armed forces, and in one of the annexes to that document the words occur:

"Quarrels with Poland should be avoided. Should Poland, however, adopt a threatening attitude toward Germany, 'a final settlement' will be necessary, notwithstanding the pact with Poland. The aim is then to destroy Polish military strength, and to create in the east a situation which satisfies the requirements of defense. The Free State of Danzig will be incorporated into Germany at the outbreak of the conflict at the latest. Policy aims at limiting the war to Poland, and this is considered possible in view of the internal crisis in France, and British restraint as a result of this."

In spite of the contents of those two directives, Hitler made a speech in the Reichstag on the 28th April 1939, in which, after describing the Polish Government's alleged rejection of an offer he had made with regard to Danzig and the Polish Corridor, he stated:

"I have regretted greatly this incomprehensible attitude of the Polish Government, but that alone is not the decisive fact; the worst is that now Poland like Czechoslovakie a year ago believes, under the pressure of a lying international campaign, that it must call up its troops, although Germany on her part has not called up a single man, and had not thought of proceeding in any way against Poland. . . . The intention to attack on the part of Germany which was merely invented by the international Press . . ."

It was 4 weeks after making this speech that Hitler, on the 23d May 1939, held the important military conference to which reference has already been made. Among the persons present were the defendants Goering, Raeder, and Keitel. The adjutant on duty that day was Lieutenant Colonel Schmundt, and he made a record of what happened, certifying it with his signature as a correct record.

The purpose of the meeting was to enable Hitler to inform the heads of the armed forces and their staffs of his views on the political situation and his future aims. After analyzing the political situation and reviewing the course of events since 1933, Hitler announced his decision to attack Poland. He admitted that the quarrel with Poland over Danzig was not the reason for this attack, but the necessity for Germany to enlarge her living space and secure her food supplies. He said:

"The solution of the problem demands courage. The principle by which one evades solving the problem by adapting oneself to circumstances is inadmissible. Circumstances must rather be adapted to needs. This is impossible without invasion of foreign states or attacks upon foreign property."

Later in als address he added:

"There is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war. Our task is to isolate Poland. The success of the isolation will be decisive. . . . The isolation of Poland is a matter of skillful politics."

Lieutenant Colonel Schmundt's record of the meeting reveals that Hitler fully realized the possibility of Great Britain and France coming to Poland's assistance. If, therefore, the isolation of Poland could not be achieved, Hitler was of the opinion that Germany should attack Great Britain and France first, or at any rate should concentrate primarily on the war in the West, in order to defeat Great Britain and France quickly, or at least to destroy their effectiveness. Nevertheless, Hitler stressed that war with England and France would be a life and death struggle, which might last a long time, and that preparations must be made accordingly.

During the weeks which followed this conference, other meetings were held and directives were issued in preparation for the war. The defendant von Ribbentrop was sent to Moscow to negotiate a non-

aggression pact with the Soviet Union.

On the 22d August 1939 there took place the important meeting of that day, to which reference has already been made. The prosecution have put in evidence two unsigned captured documents which appear to be records made of this meeting by persons who were present. The first document is headed: "The Fuehrer's speech to the Commanders in Chief on the 22nd August 1939 . . . " The purpose of the speech was to announce the decision to make war on Poland at once, and Hitler began by saying:

It was clear to me that a conflict with Poland had to come sooner or later. I had already made this decision in the spring, but I thought that I would first turn against the West in a few years, and only afterw a against the East . . . I wanted to establish an acceptable viationship with Poland in order to fight first against the West. But this plan, which was agreeable to me, could not be executed since essential points have changed. It became clear to me that Poland would attack us in case of a conflict with the West."

Hitler then went on to explain why he had decided that the most favorable moment had arrived for starting the war. "Now," said Hitler, "Poland is in the position in which I wanted her . . . I am only afraid that at the last moment some Schweinhund will make a proposal for mediation . . . A beginning has been made for the destruction of England's hegemony."

This document closely resembles one of the documents put in evidence on behalf c. the defendant Raeder. This latter document consists of a summary of the same speech, compiled on the day it was made, by one Admiral Boehm, from notes he had taken during the meeting. In substance it says that the moment had arrived to settle the dispute with Poland by military invasion, that although a conflict between Germany and the West, was unavoidable in the long run, the likelihood of Great Britain and France coming to Poland's assistance was not great, and that even if a war in the West should come about, the first aim should be the crushing of the Polish military strength. It also contains a statement by Hitler that an appropriate propaganda reason for invading Poland would be given, the truth or falsehood of which was unimportant, since "the Right lies in Victory."

The second unsigned document put in evidence by the prosecution is headed: "Second Speech by the Fuehrer on the 22d August 1939," and it is in the form of notes of the main points made by Hitler.

Some of these are as follows:

"Everybody shall have to make a point of it that we were determined from the beginning to fight the Western Powers. Struggle for life or death . . . destruction of Poland in the foreground. The aim is elimination of living forces, but the arrival at a certain line. Even if war should break out in the West, the destruction of Poland shall be the primary objective. I shall give a propagandist cause for starting the war—never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the Right is what matters, but Victory . . . The start will be ordered probably by Saturday morning." (That is to say, the 26th August.)

In spite of it being described as a second speech, there are sufficient points of similarity with the two previously mentioned documents to make it appear very probable that this is an account of the same speech, not as detailed as the other two, but in substance the same.

These three documents establish that the final decision as to the date of Poland's destruction, which had been agreed upon and planned earlier in the year, was reached by Hitler shortly before the 22d August 1939. They also show that although he hoped to be able to avoid having to fight Great Britain and France as well, he fully realized that there was a risk of this happening, but it was a risk which he was determined to take.

The events of the last days of August confirm this determination.
On the 22d August 1939, the same day as the speech just referred to,
British Prime Minister wrote a letter to Hitler, in which he said:

"Having thus made our position perfectly clear, I with to repeat to you my conviction that war between our two peoples would be the greatest calamity that could occur."

On the 23d August, Hitler replied:

"The question of the treatment of European problems on a peaceful basis is not a decision which rests with Germany, but primarily on those who since the crime committed by the Versailles Dictate have stubbornly and consistently opposed any peaceful revision. Only after a change of spirit on the part of the responsible Powers can there be any real change in the relationship between England and Germany."

There followed a number of appeals to Hitler to refrain from forcing the Polish issue to the point of war. These were from President Roosevelt on the 24th and 25th August; from His Holiness the Pope on the 24th and 31st August; and from M. Daladier, the Prime Minister of France, on the 26th August. All these appeals fell on deaf

On the 25th August, Great Britain signed a pact of mutual assistance with Poland, which reinforced the understanding she had given to Poland earlier in the year. This coupled with the news of Mussolini's unwillingness to enter the war on Germany's side, made Hitler hesitate for a moment. The invasion of Poland, which was timed to start on the 26th August, was postponed until a further attempt had been made to persuade Great Britain not to intervene. Hitler offered to enter into a comprehensive agreement with Great Britain, once the Polish question had been settled. In reply to this, Great Britain made a countersuggestion for the settlement of the Polish dispute by negotiation. On the 29th August, Hitler informed the British Ambassador that the German Government, though skeptical as to the result, would be prepared to enter into direct negotiations with a Polish emissary, provided he arrived in Berlin with plenipotentiary powers by midnight for the following day, August 30. The Polish Government were informed of this, but with the example of Schuschnigg and Hacha before them, they decided not to send such an emissary. At midnight on the 30th August the defendant von Ribbentrop read to the British Ambassador at top speed a document containing the first precise formulation of the German demands against Poland. He refused, however, to give the Ambassador a copy of this, and stated that in any case it was too late now, since no Polish plenipotentiary had arrived.

In the opinion of the Tribunal, the manner in which these negotiations were conducted by Hitler and von Ribbentrop showed that they were not entered into in good faith or with any desire to maintain peace, but solely in the attempt to prevent Great Britain and France

from honoring their obligations to Poland.

Parallel with these negotiations were the unsuccessful attempts made by Goering to effect the isolation of Poland by persuading Great Britain not to stand by her pledged word, through the services of one Birger Dahlerus, a Swede. Dahlerus, who was called as a witness by Goering, had a considerable knowledge of England and of things English, and in July 1939 was anxious to bring about a better understanding between England and Germany, in the hope of preventing a war between the two countries. He got into contact with Goering as well as with official circles in London, and during the latter part of August, Goering used him as an unofficial intermediary to try and deter the British Government from their opposition to Germany's intentions toward Poland. Danlerus, of course, had no knowledge at the time of the decision which Hitler had secretly announced on the 22d August, nor of the German military directives for the attack on Poland which were already in existence. As he admitted in his evidence, it was not until the 26th September, after the conquest of Poland was virtually comp'ete, that he first realized that Goering's aim all along had been to get Great Britain's consent to Germany's coizure of D 1 1

After all attempts to persuade Germany to agree to a settlement of her dispute with Poland on a reasonable basis had failed, Hitler, on the 31st August, issued his final directive, in which he announced that the attack on Poland would start in the early morning of the 1st September, and gave instructions as to what action would be taken if Great Britain and France should enter the war in defense of Poland.

In the opinion of the Tribunal, the events of the days immediately preceding the 1st September 1939, demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.

(G) THE INVASION OF DENMARK AND NORWAY

The aggressive war against Poland was but the beginning. The aggression of Nazi Germany quickly spread from country to country. .In point o' time the first two countries to suffer were Denmark and

On the 31st May 1939, a treaty of nonaggression was made between Germany and Denmark, and signed by the defendant von Ribbentrop. It was there solemnly stated that the parties to the treaty were "firmly resolved to maintain peace between Denmark and Germany under all circumstances." Nevertheless, Germany invaded Denmark on the 9th April 1940.

On the 2d September 1939, after the outbreak of war with Poland,

Germany sent a solemn assurance to Norway in these terms:

"The German Reich Government is determined in view of the friendly relations which exist between Norway and Germany, under no circumstance to prejudice the inviolability and integrity of Norway, and to respect the territory of the Norwegian State. In making this declaration the Reich Government naturally expects, on its side, that Norway will observe an unimpeachable neutrality towards the Reich and will not tolerate any breaches of Norwegian neutrality by any third party which might occur. Should the attitude of the Royal Norwegian Government differ from this so that any such breach of neutrality by a third party occurs, the Reich Government would then obviously be compelled to safeguard the interests of the Reich in such a way as the resulting situation might dictate."

On the 9th April 1940, in pursuance of her plan of campaign, Norway

was invaded by Germany.

The idea of attacking Norway originated, it appears, with the defendants Raeder and Rosenberg. On the 3d October 1939, Raeder prepared a memorandum on the subject of "gaining bases in Norway," and amongst the questions discussed was the question: "Can bases be gained by military force against Norway's will, if it is impossible to carry this cut without fighting?" Despite this fact, 3 days later, further assurances were given to Norway by Germany, which stated:

"Germany has never had any conflicts of interest or even points of controversy with the Northern States and neither has she any today."

Three days later again, the defendant Doenitz prepared a memorandum on the same subject, namely, bases in Norway, and suggested the establishment of a base in Trondheim with an alternative of supplying fuel in Narvis. At the same time the defendant Raeder was in correspondence w. h Admiral Karls, who pointed out to him the importance of an occupation of the Norwegian coast by Germany. On the 10th October, Raeder reported to Hitler the disadvantages to Germany which an occupation by the British would have. In the months of October and November Raeder continued to work on the possible occupation of Norway, in conjunction with the "Rosenberg Organization." The "Rosenberg Organization" was the Foreign Affairs Bureau of the NSDAP, and Rosenberg as Reichsleiter was in charge of it. Early in December, Quisling, the notorious Norwegian traitor, visited Berlin and was seen by the defendants Rosenberg and Raeder. He put forward a plan for a coup d'etat in Norway. On the 12th December, the defendant Raeder and the naval staff, together with the defendants Keitel and Jodl, had a conference with Hitler, when Raeder reported on his interview with Quisling, and set out Quisling's views. On the 16th December, Hitler himself interviewed Quisling on all these matters. In the report of the activities of the Foreign Affairs Bureau of the NSDAP for the years 1933-43, under the heading of "Political preparations for the military occupation of Norway," it is stated that at the interview with Quisling, Hitler said that he would prefer a neutral attitude on the part of Norway as well as the whole of Scandinavia, as he did not desire to extend the theater of war, or to draw other nations into the conflict. If the enemy attempted to extend the war he would be compelled to guard himself against that undertaking. He promised Quisling financial support, and assigned to a special military staff the examination of the military questions involved.

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MONEY AND BANKING

(REVISED)

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February 1945

DIVISION OF POSTARY RESEARCH

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despite the moratorium on reparations payments in July 1931, payments to foreign creditors had to be suspended and close government control had to be established over all international transactions. The loss of international confidence promptly produced a demostic banking crisis in Germany, egain necessitating drastic governmental intervention. These developments ... ore the starting point for great structural changes in the monetary and banking sphere which, as further exploited under the Masi regime, brought Cormany a "totalitarian" financial system.

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The severance of free exchange relations with the outside world. partially originally adopted as an emergency measure, conformed upon the Nazi Roich a weapon which was deliberately used to captelt foreign creditors, to aggrandize Germany's position in international trade, and to facilitate internal finencial experiments which would have collapsed under the impact of froo me of forces. Gormany became a cheadd seenomy with a currency s profited sustained not by gold and exchange received but by totalitarian control lissolved over prices, wages, interest rates, and profits. Economic activity, fellon to a low obb after the financial critic, was gradually revived by reemploymont and recovery measures initiated by the pre-Hitler regimes and extended on an increasing weele by the Nexis. Imporceptibly, those measures, originally conceived as weapons against decommic depression, developed into instruments for rearming the Reich for the next World War. The Reich programs rolled largely upon financial devices of a potentially inflationary itutions character, and efter full employment was achieved in 1935-36, thecontinued expansion of money and credit necessitated increasingly stringent control over the price-wege structure to avoid deprociation in the value of the currency. The distribution of incomo, the volume of savings, and the direction of investment were all manipulated to the end of enlisting resources for the rearmement progrem. The Reich's fiscal policy, like many other elements in Germany's economic organization, was on a wer-time basis long boford September 1939.

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As might be expected, Gorman Banking institutions became regimented under the Nezi regime as much as all other economic enterprises. Of criticel importance was the tra formation of the Reiensbank from an independent precion authority with a monsure of international control into a subservient inc. ment of the Reich Government's fiscal policy. All y in 1933, all offective limitations on the volume of its note issue were discarded, and control over the institution was firmly established in government hands. The leading commercial banks; most of them thoroughly shakon by the events of 1931-32 and already before Hitler heavily infiltrated by government influence, were similarly harnessed to the financial progrems of the Reich. The Government--or Reich institutions--actually acquired ownership of a large portion of the commercial banking system during the crisis, but most of such interests were "reprivatized" in 1937. By that time the whole banking structure was so thoroughly regimented that ownership of individual institutions was superfluous as a measure of control.

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Over-all government supervision of banking activities, also initiated before Hitler as a result of the glaring weaknesses revealed by the banking crisis, was developed by the Nazis into a virtual strait-jacket for crodit institutions. A general law of 1934, amended in detail in 1939,

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secured by a collective mortgage imposed on all German industry and agriculture. The exchange rate between the new Rentenmark and the inflated Reichsbank currency became one trillion to one. In the following year, however, pursuant to the Dawes Plan for rehabilitating Gorman finance and collecting reparations, the Reichsbank was reorganized and in August 1924 resumed its role as bank of issue, emitting a new Reichsmark currency at parity with the Rentenmark.

Although the German currency now had the same gold value as before the war, all money claims in pre-war Marks had been virtually wiped out by the depreciation of that unit. The impact of this development was partially modified by a complex series of laws revaluing pro-stabilization claims of a long-term character such as bonds, mortgages, and savings deposits. Generally speaking, however, the money savings of the German public were destroyed, with permanent effects on the social structure (especially the pauperization of the middlo class). On the other hand, some classes profite from the inflation: notably the farmers, whose debts were largely dissolved; although they romained in a parlous state; and certain large industrial and a financial interests which amassed vest speculative fortunes by investing borrowed funds in tangible proporties which survived the monetary debacle. Although in principle the banking system stood in a neutral position, with both assets and liabilities largely stated in money terms, it was shaken to .: its foundations by the discolor and distress attending the inflation; especially the savings banks, credit cooperatives, and mortgage institutions emerged from the ordeal in a sadly deflated state.

The span of years between stabilization in 1923-24 and the enset of the world depression in 1930-31 was marked by steady progress in the rationalization and consolidation of the banking system. During the period," the Roich entered the banking field on an extensive scale with the foundation of various special institutions with important financial functions. The whole recovery program was sustained by an influx of foreign cenital, especially from the United States, and in fact appears to have become so dependent upon this factor that the first signs of a diminution of the capitel flow in 1929-30 produced symptoms of distress in Germany. Superficially, howover, there was a remarkable degree of prosperity--cormercial banks actively supported a renewed expansion of trade and industry, savings . doposits were rapidly reconstituted, and agricultural credit was much in demand for financing the extension of farming cotivities. The private sector of the banking system thus found itself fully engaged, despite increasing compotition from the public sector, where now institutions were founded to direct public funds -- and the proceeds of foreign loans -- into many forms of oconomic activity.

The world economic and financial orisis of 1931 had its first important manifostation in Control Europe, first in Austria and then in Germay. The crisis grew out of a compound of basic economic disequilibria and financial disorders, but it first emerged on a large scale in the form of panie withdrawals of short-torm funds from Control Europe by creditors. in the Western countries, including the United States. Germany's gold and exchange reserves were rapidly dissipated in moeting this outflow, and



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A Modern History

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this was the enormously popular Jonny Spielt Auf ("Johnny Strikes Up") by Ernst Krenek, which was first produced in 1927 at Leipzig and swept Germany and Europe. The legitimate stage was dominated by the rich talent of Max Reinhardt, whose famous production of The Miracle toured the Western world. The German motion picture industry produced important artistic successes with such stars as Elizabeth Bergner, Marlene Dietrich, Emil Jannings, and Erich von Stroheim. Probably in America the best-known German film of the period is The Blue Angel with Jannings and Dietrich, which is still revived as a classic.

It goes without saying that Germany maintained her high level of scholarship in both the social and natural sciences. It will suffice merely to mention the names of Max Weber in sociology, Friedrich Meinecke in history, Albert Einstein in physics, Max Planck in mathematics, and in psychology Sigmund Freud, who lived most of his life in nearby

Austria.

Germany partici d to the full in the jazz-age madness characteristic of the whole world in the twenties. During these years Berlin has been described as one of the most libertine and dissolute cities in modern history. There was an almost unrestricted outlet for any kind of sexual drive or bohemian activity. The puritanical strain in the lower-middle-class Nazis was grossly affronted by this; the party launched tirades against what they termed Kulturbolschewismus ("the bolshevization of culture"), although the connection between the artistic world of Weimar Germany and the Bolshevik party was not always discernible.

In retrospect the frenzied and agitated decade of the twenties looks like a danse macabre. The observer today knows where all this was to lead, but at the time prosperity looked endless and the chance for gaiety and abandon without limit. Some of the creative minds of the period, with the sixth sense of the artist, saw where Germany was heading and put their fears on paper or canvas or in musical notation, where they are easily perceivable. However, they were the minority. The great mass danced on heedlessly, recklessly, until in 1929 and 1930 the cock crew and the dancers had to return to their graves.

CHAPTER XXVI

Death Agony of a Republic (1929-33)

The last years of the Weimar Reputition were tragic in the extreme. They were of course dominated by the world-wide depression which, spreading quickly from the United States, devastated the other advanced nations. It was the most industrially sophisticated countries which suffered worst. Of these Germany was the first to feel the severe impact because her false prosperity of the years before had been based almost completely on short-term loans, which were called in as soon as credit became tight. Within a matter of months, even weeks, after the first New York crash in October 1929, German industrialists were forced to curtail their operations and discharge workers. The process spiraled, moving with everincreasing velocity, so that by the spring of 1930 Germany was in a worse position than in 1923 because this time the crisis was world-wide and the Germans could not look for succor abroad.

The economic tensions had the result of reopening the political and social wounds which had lain dormant for some years, plastered over by prosperity. The years from 1930 to 1933 are years of naked class warfare with extremism constantly gaining over moderate attitudes. A characteristic of the four Reichstag elections held in these years is that the parties of the extreme right and extreme left gained at the expense of the old ruling parties near the center. As a result, constitutional, parliamentary government became almost impossible and the way was open to invoke Article 48 and to rule by presidential decree. When that was done, the important factors in German developments became the relationships between a number of individuals and the aged and increasingly senile Hindenburg. Thus in this period it is individuals (Brüning, Papen, Schleicher, Hugenberg, and, of course, Hitler), with their deals and their chicanery, who must be analyzed rather than the principles which allegedly guided them. The years remind one of the less savory moments of the Byzantine Empire rather than of a great modern state in the twentieth century.

Germany started to feel the economic pinch even before the Wall Street crash. In early 1929 credit started to become tight and unemployment statistics began to mount. The political reaction was immediate, It took the form of an attack on the unemployment insurance scheme which had been worked out two years before. The problem with this type of insurance is that the moments when it is urgently needed are exactly the moments when credit is most difficult to obtain. The parties of the right, representing the interests of the employers, started to clamor for the lowering of insurance premiums, while the Social Democrats. in control of the government, refused to see the law diluted when it was most needed. The result was a long parliamentary battle lasting through most of 1929 and into 1930 at the same time that the even more bitter conflict over the acceptance of the Young plan was being fought. Stresemann was seriously worried about the insurance struggle because he feared it would raise tension among the parties and endanger his beloved foreign policy, so he spent the last day of his life in a temporarily successful plea to his own party to follow the path of moderation. The result was a stroke the next morning which felled him. Without his influence the problem grew worse and a few months after his death, in March 1930, as soon as the Young plan legislation had finally been passed, Chancellor Müller gave up the battle and resigned.

The next day, March 28, President Hindenburg appointed a new chancellor, Heinrich Brüning, leader of the Center party. Brüning was a new figure in German politics and came from a younger generation. He was the first of the chancellors to have been a front fighter in the war. Deeply Catholic, Brüning was undecided after the war whether to go into politics as a career or to enter the religious life. He elected the former and soon became the Center party expert on financial matters. He climbed the party ladder rapidly and in due course became the chairman. Brüning is a cold, dour man, almost completely devoid of personal charm or magnetism. His appeal was through logic and statistics, never through the emotions. It is difficult to think of anyone less adapted personally to fight against the passionate intensity of Hitler or the deep-seated rancor of Hugenberg. Brüning has been much criticized as the slayer of German democracy because he was willing to rule by presidential decree and to undermine the Reichstag. However, in the circumstances which prevailed after the election of 1930, it seems impossible to imagine how else any kind of government could have been maintained.

Brüning's appointment was not popular on the left because he had been associated with the project to curtail unemployment insurance. Thus on his first appearance before the house as chancellor he was rected with the phrase hanger chancellor," which remained with him

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during his two years in office. His cabinet included a number of carryovers from Müller's ministry but no Social Democrats, with the result
that it was weighted much more heavily on the right. Brüning's program
was one of conservative liberalism. He was an orthodox economist who
believed that in times of stress the government should retrench and make
every possible economy. However, he realized that there were some
areas in which this was not possible. In particular, to please the Nationalists he supported the Osthilfe, or subsidy of the marginal large
landholders in the east, a subject close to Hindenburg's heart. Brüning
held over the Reichstag the threat of dissolution and left little doubt that
he and the president were thinking actively of the possibility of ruling
by presidential decree if the Reichstag were unco-operative. He won a
first vote of confidence. The Social Democrats and the Nazis voted against
him, but the Center party and the Nationalists (to the fury of Hitler)
supported him.

In the months from April to July 1930 there was a good deal of soulsearching among the parties; Brüning made a number of financial proposals but was never sure of his precarious majority. He had to depend on either the Social Democrats or the Nationalists. The Social Democrats were opposed to him because they felt that his program would harm the working class and that the cuts in the budget should be made elsewhere, especially in the military appropriations. The Nationalists were angry at Brüning for the opposite reasons; they believed that the proposed taxes to balance the budget would fall inequitably on the upper classes of society, and reiterated that Germany's problems stemmed from reparations and from the Young plan. The Communists would have nothing to do with the government, while the Nazis, though small in number in the Reichstag, were becoming more insolent because of gains they had made in local elections. For example, in Thuringia in late 1929 a Nazi leader, Wilhelm Frick, became minister of the interior and started to conduct a violent racist campaign, while in mid-1930 the Nazis became the second largest party in the Saxon parliament. Gangsterism and Violence were growing apace in Berlin and the other large cities. The nights were made hideous and dangerous by armed street fighting, fomented by the Nazi strong-arm boys but joined in too by Communists and other dissidents. This became so serious that in June 1930 the Prussian minister of the interior forbade the Nazis to wear uniforms or emblems. In spite of this, the violence continued.

The showdown came in July. On July 15 Brüning went to the Reichstag and demanded that the house show its sense of responsibility by approving his fiscal policy and passing a balanced budget. His threat to rule by presidential decree was thinly veiled. Hindenburg backed up

his chancellor by promising him the use of Article 48 if he didn't get his way and also by promising a dissolution of the Reichstag. Even in the face of this, however, the opposition parties held their ground. On July 16 a bloc of Communists, Social Democrats, Nationalists, and Nazis defeated several of the government projects. The executive carried out its threat that very evening. The government did not resign but decreed its program as an emergency measure. The Reichstag now, according to the constitution, had an opportunity to approve the decrees or to demand their withdrawal. This was a last chance for agreement. The Social Democrats were very much aggrieved and insisted that the moment had not warranted the drastic action. They declared that not all constitutional possibilities had been explored, particularly the possibility of inviting themselves into counsel since they were still the largest party. The Nationalists weakened a bit, only Hugenberg's extreme supporters remaining adamantly anti-Brüning. When the votes were counted, enough Nationalists opposed the government that by a majority of only fifteen votes the Reichstag demanded the withdrawal of the presidential edicts. Hindenburg simply signed a decree of dissolution of the Reichstag and set September 14 as the date for new elections. In the interim he decreed a number of other projects developed by Brüning, which called for a deflationary program with increased taxes, a balanced budget, and government economies even in the field of social welfare, especially in unemployment insurance.

From this moment on it can hardly be said that Germany was governed by a parliamentary system. The focus of interest shifts to the strong executive where everything depended on Hindenburg, who alone could ensure the passage of the government's program. The field marshal was now eighty-three years old and much reduced in vigor, both physical and mental. In particular, his eyesight was affected and he had to depend on his son Oscar, who acted as his secretary, to write out for him in very large letters the matters which Oscar believed the president should see. This, of course, gave Oscar Hindenburg a key position at a moment of emergency. Like many old and senile men, Hindenburg was highly susceptible to the influence of those frequently around him. During this period the man of greatest influence in the president's inner circle was General Kurt von Schleicher.

Schleicher was an extraordinary person, almost comparable to Father Joseph, Cardinal Richelicu's "gray eminence." He rose rapidly through the ranks of the officer corps and had very little contact with the fighting troops. From his school days he had been close to the Hindenburg family. During the war he served almost always at headquarters, where he attracted the admiring attention of General Groener. During the

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Weimar period he stayed on at the war office, becoming an immediate assistant to Seeckt and, of course, profiting from the appointment of Groener to succeed Gessler as minister. He was shrewd, highly intelligent, a manipulator of men, the perfect political general, a person who wanted to wield power, but always from the background without the responsibility resulting from action in the public limelight. By 1930 he was the key man in the army and had richly improved his friendship with the Hindenburgs, father and son. His political ideas, so far as we know them, were conservative, but not reactionary like Hugenberg's. From 1930 until 1932, when he overreached himself, he was the most important figure in the presidential group; Brüning had to rely upon him for his entrée to the field marshal because the old man did not much like his cold and austere chancellor.

It is difficult to convey an idea of the bitterness and ferocity with which the election campaign of 1930 was fought. The proliferation of parties reached the point of absurdity; in 1930 fifteen offered themselves to the electorate. As might be expected, the Nazis made the most noise. They devoted their efforts, financed by some of the leading west German industrialists, to the middle-class unemployed and to the despairing peasantry. They were rewarded by remarkable success. The Nazis polled almost six and one half million votes, and their representation jumped from a paltry 12 to 107, making them the second largest party in the Reichstag. The Social Democrats maintained their position as the largest party but lost a number of seats; they now had 143. The third party in the nation was now the Communist party, which, like the Nazis battening on distress, raised its delegation from 54 to 77. Obviously the losers were the bourgeois parties, including the Nationalists who suffered seriously and the Democrats who had changed their name to State party and almost disappeared from view.

The most important event in the weeks between the election and the assembling of the Reichstag was the decision of the Social Democrats to support Brüning and thus assure him of a majority. Brüning had announced that he was determined to push his program even at the cost of establishing a dictatorship. In view of this the socialists, though there were many parts of the program that were hateful to them, decided to make a sacrifice to preserve some semblance of democratic government.

The new Reichstag met on October 13, 1930, amid tumult. The Nazi deputies marched to their seats in full party uniform and proceeded to make nuisances of themselves by singing, shouting, and unseemly behavior. Not to be outdone, the Communists replied in kind, and these two set the pace for the parody of parliamentary government which was to be enacted in Germany for the next several years. Brüning was greeted

by shouts and boos, but presented his program with extraordinary imperturbability. It is address was followed by Hermann Müller speaking for the Social Democrats and stating their grudging willingness to support the chanc, for. When a vote of confidence was taken, the government won its majority and the Reichstag adjourned for six weeks during which Hindenburg issued more decrees, including the deflationary and conservative budget for the following year.

Little is gained by retelling the shameful story of the antics of the Reichstag during the early months of 1931. The extremists on both sides continued their policy of obstruction with increasing vigor. Poor Brüning had to put up with every kind of abuse and attack; he comported himself with a calm serenity that showed his conviction that these were just temporary days of chaos and that better times would restore Germany to the democratic pattern in which she belonged. Finally in March the Reichstag admitted its own incompetence and adjourned for the unusually long period of seven months.

Brüning's hope that conditions would soon improve was not to be the year 1931 started as inauspiciously as possible. Unemployment continued to soar, and all of Europe fell further into the morass of depression. One of the most afflicted countries was the little Austrian republic, which had never been a workable economic unit and was now in a bad way because of the withdrawal of short-term loans. The desire in Austria for a union (Anschluss) with Germany was strong and reciprocated. This was, however, specifically prohibited by the treaties of 1919. Brüning and the Austrian government worked out a plan for a customs union between the two which would not infringe the treaties and which might help to alleviate the serious condition of each. The plan was announced to the world in March 1931 but met with unalterable opposition from France and some of her allies. Germany was required to put the plan before the World Court at The Hague for a decision as to whether it was a breach of the treaties. A few months later the court ruled that it was a breach, so nothing came of the idea.

In May catastrophe loomed. The Kreditanstalt, the largest Austrian bank and one which had close and vital ties throughout Germany and central Europe, declared bankruptcy. The impact on Germany was very serious and for some weeks it looked as if important German banks would follow suit and create a desperate situation.

The American president, Herbert Hoover, came to the rescue with the suggestion that there should be a moratorium for a year of payments both for reparations and for war debts owed to the United States. The French were doubtful about agreeing to this plan but finally did so after they had insisted on several political concessions from Germany.

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However, this was not enough. The flight of capital from Germany continued at an alarming rate. At last in the autumn of 1931 Germany's creditors agreed not to recall any more loans for a period of six months. This so-called "standstill" agreement was later extended for several years and helped Germany to weather the crisis.

Probably the most significant event of late 1931 for Germany's future was the formation of the Harzburg front. On October 11 in the little town of Harzburg a powerful group convened, including among others Hitler, Hugenberg, Schacht, Fritz Thyssen (head of the giant United Steel Works), and Franz Seldte (head of the Stahlhelm, the Nationalists' paramilitary organization). Here an alliance was formed which was to have great significance. Even more important was the fact that Hitler was beginning to make himself respectable. He was anxious to push a wedge into the world of business and industry, and therefore he toned down any possible radical implications in the Nazi program. He continued this campaign successfully in January 1932, when on the birthday of William II he was invited to address the Industry Club in Düsseldorf. His speech was largely an invective against Communism, the bugbear which alarmed the industrialists so fearfully. He managed to convince a good part of his powerful audience that not only was Nazism no threat to big business but that on the contrary it would serve the purpose of preventing any radicalism from the left. The leaders of industry grievously misjudged their man because they were so anxious to win to their side the huge following which Hitler had amassed.

In early 1932 Hindenburg's presidential term was drawing to a close. Many German leaders were appalled at the idea of an election during the severe crisis of the moment and loath to incur the expense. Brüning in particular was of this opinion and feit that the Reichstag should pass special legislation continuing Hindenburg's term for a year or two. This would necessitate an amendment to the constitution and a two-thirds vote, but a two-thirds vote would require the Nazi vote. Brüning had a meeting with Hitler, but Hitler refused to permit the Nazis to vote for the project, saying that it was simply a way for Brüning to continue his political career.

Hindenburg was at first reluctant to stand for re-election for a term of office which he almost surely would not survive. However, he allowed himself to be persuaded, no doubt by Schleici er, and announced his candidacy in February. All the parties between Nationalist and Communist declared their support of him. These included the parties which had opposed him in 1925. Hindenburg was now the paladin of democracy in this topsy-turvy period. The right-wing parties were angry at Hindenburg for placing himself in the hands of the republicans. A few

days later the Nazis announced that Hitler would be a candidate. He was now eligible because he had at last become a German citizen by being appointed to a government job in Nazi-controlled Brunswick. The nationalists nominated a candidate of their own, Theodor Duesterberg, and the Communists once more ran Ernst Thälmann.

The campaign was a short, sharp one. Hindenburg was obviously too old to do much campaigning for himself. Brüning became his manager and wore himself out for the old man. People who were in Germany at the time recall how Brüning transcended himself during those weeks. His drab and colorless personality took on color and emotion. His efforts were successful. The election took place on March 13. Hindenburg received eighteen and one half million votes; Hitler, eleven million; Duesterberg, two and one half million; and Thälmann, almost five million. Hindenburg missed a majority by less than one per cent. Duesterberg withdrew from the second election, and in it Hindenburg amassed over nineteen million votes while Hitler polled almost thirteen and one half million.

It looked for a few days as if democracy had received a new lease on life. The government immediately issued an order disbanding both the S.A. and the S.S. However, bad news lay ahead. At the end of April Land elections were held throughout Germany, the most important of which was in Prussia. The Nazis became much the largest party in the Prussian parliament, although they did not control a majority. For the time being the old Center-Social Democrat coalition under Otto Braun continued in office.

In spite of his achievements, Brüning's days were numbered. For some months Schleicher had been poisoning the old president's mind against him. Schleicher had decided that the chancellor was a man of too much independence and stubbornness to move Germany into the conservative path that the army wanted. Some of the industrialists, who were now not averse to flirting with Hitler, alleged that Brüning's program of low prices and deflation was bad for business. Schleicher warned Hindenburg that Brüning was becoming socialistic. Hindenburg's democratic veil fell off, and it became apparent that he was still the Prussian militarist allied with the agrarian class.

Brüning was not unaware of the cabal against him. He tried desperately to achieve a victory in foreign affairs, either on reparations or on equality of armaments for Germany at the World Disarmament Conference which had just opened in Geneva. He failed in both attempts. The powers were unwilling to grant to Brüning, the democrat, what they later granted to Papen, the aristocrat, or to Schleicher, the militarist.

The final crisis arose over a project of Brilining's to solit up some of

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the bankrupt estates in the east to make more jobs. This plan struck Hindenburg where he was most sensitive, since he was a landowner in that part of the courtry. On May 29, 1932, he simply asked Brüning for his resignation. This was much more the action of a William II than of a constitutional president in a parliamentary state, but the president was now in control. Brüning left the stage of German history and Germany itself after Hitler became chancellor, accepted a post on the faculty of government at Harvard, and did not return to Germany until after 1945.

On the day after Brüning's resignation, Hindenburg, on the advice of Schleicher, named as chancellor a relative newcomer in politics, Franz von Papen. Papen was a Catholic aristocrat from west Germany, who was trained as an army officer. During the war he served for some months as military attaché in Washington, but his removal was requested by President Wilson because of alleged sabotage of American munitions plants. Later he was placed on active duty on the Turkish front. After the war Papen and his very rich wife, who was connected with powerful in social interests in the Saar, lived the life of wealthy country gentry at which Papen shone. He was handsome, charming, glib, a first-rate horseman. He played with politics but never let it take up too much of his time. For several years he was a member of the Prussian parliament where he was affiliated with the extreme right wing of the Center party, although he was never very keen on party solidarity. He won his way to the heart of Hindenburg through his ability as a raconteur and entertainer; the old gentleman spoke of him as "Fränzchen" ("little Franz").

Schleicher's reason for choosing Papen was to have him serve as the head of a cabinet of experts, nonpolitical in character, which would push Germany in the direction of conservative, aristocratic rule. In fact, he had the slate of names ready when Papen arrived in Berlin. He had even taken the trouble of securing Hitler's "toleration" of the new regime in return for legalizing the S.A. and the S.S., which Hindenburg wanted too, for it did not seem fair to him to outlaw the Nazi formations and not those of the other parties. There was not even a pretense at forming a government which could command a majority in the Reichstag. It remained to be seen even how much Hitler's "toleration" would mean.

When the names of the new ministers were published, it was clear that the cabinet of experts was really a cabinet of barons, so large was the proportion of aristocratic names. Schleicher himself became minister of defense, and three men who were to last into the Nazi period were introduced to the world. They were Baron Constantin von Neurath at the foreign office. Count Schwerin-Krosiek at the ministry of finance.

and Franz Gürtner at the ministry of justice. Within a few dagovernment dissolved the Reichstag and called for new election.

turned out, this too was a Nazi demand, for the Nazis were sure that their following had grown immensely since 1930. Once again the hungry and impoverished Garr an people were faced with the expense and nuisance

of a political campaign. Two important events occurred in the interim between the dissolution of the Reichstag and the new elections, which were held on July 31, 1932. The first was an international conference held at Lausanne during June and early July. On its agenda was a final settlement of the reparations problem. This would have been a fitting climax to Stresemann's and Brüning's careful preparation, but it was delayed so that the glory became Papen's. The Germans asked for the termination of all reparation payments, but the French were not willing to go so far so soon. After several weeks of wrangling a solution was reached by which the Young plan was abolished, Germany was to make one token contribution to a fund for general European recovery, and then reparation payments were to cease. At last this problem, which had so bedeviled the international scene for thirteen years, was out of the way. It need not be emphasized to what degree Papen considered this arrangement his own personal triumph.

The other development, which concerned the government of Prussia, was much more sinister. After the April elections in Prussia no government had been formed. The parties were still jockeying for position and the Nazis, as usual, were behaving in a completely recalcitrant manner. The old Social Democratic cabinet headed by Otto Braun and Carl Severing, which had served during most of the history of the republic and had governed Prussia so wisely, was still in office as a caretaker ministry. Papen kept ordering the Prussians to form a new government which he knew was impossible at the moment. He hoped to find a pre text to intervene by presidential decree, appoint a federal commissione to take power, and thus gain control of the largest state in German and in particular of the large and efficient Prussian police force.

It was not hard to find the pretext. Ever since the Nazi armed formations had open legalized, Germany was in a state approaching civil was There was constant fighting in the streets between the Nazi gangste and the formations of the other parties. Bloodshed became usual, nexceptional. Matters reached an apex on July 17 when the Nazis planne a provocative procession through the streets of Altona, a very left-wire impoverished dockyard community across the river from Hamburg to in Prussian territory. The procession turned into a street brawl, op firing occurred, and a number of people were killed.

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On July 20 Papen summoned Braun and Severing, the Prussian minister of the interior, informed them that the Prussian government was not maintaining peace, and showed them a decree from Hindenburg removing them from office and placing Prussia under the control of the federal chancellor. The Social Democrats denied the accusations and declared that this was an unconstitutional action. Severing returned to his office. Papen declared a state of emergency and sent the local army commander to dislodge the Social Democrats. Finally after a threat of force Severing left his desk. The question was what a tion the Social Democrats would now take. Would the events of the Kapp Putsch be repeated? In fact the Social Democrats did almost nothing except to protest and take the matter to the German Supreme Court. The trade unions were afraid of a general strike. Papen was left with the spoils and proceeded to replace a large number of Prussian officials with people of his own choosing.

The election campaign was even more tumultuous than usual. The Nazis staged a magnificent show. Hitler and his subordinates took to the air and flew to every village, hamlet, and town to carry the Nazi message. They hoped desperately to achieve an absolute majority so that there could be no question of their control of the government. The keynote was Hitler's promise to abolish unemployment, which was still increasing frighteningly every day.

The Nazis did not achieve their majority, but they came alarmingly close to it. They more than doubled their representation, receiving now 230 seats, but in fact their popular vote was not much more than the votes Hitler had received in the presidential election in April. This suggested that perhaps the Nazis had reached the apex of their fortunes. The Communists also made gains increasing their membership to 89, at the expense of the Social Democrats who lost a number of seats. The only two parties that Papen could count on to vote for him were the Nationalists and the People's party. Together these two mustered only 44 votes.

It had now become mournfully clear that there could be no kind of government in Germany without some participation by the Nazis. Even Papen declared as much in a public statement. Hitler was determined to achieve full power and engaged on a policy of "all or not" ng." which was daring but was considered unsound even by some of the leading Nazis who felt that force could now win the day. Hitler, however, still remembered November 1923. The first two weeks of August were consumed by dickerings and conferences among Hitler, Papen, Schleicher, and later Hindenburg. Papen was willing to offer Hitler the vice-chancellorship but he held out for the chancellorship. Papen assured Hitler

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that Hindenburg insisted on maintaining a nonparty, presidential government and would not accept the Nazi leader as chancellor. If Hitler refused to believe Papen, he could have the information from the president himself. On August 13, 1932, Hitler had a meeting with the field marshal, who detested him and spoke of him as the "Bohemian corporal." Hindenburg offered Hitler a position in a cabinet headed by Papen. Hitler refused. Hindenburg then read Hitler a lesson in good manners, chivalry, and patriotism. The interview lasted only a few minutes and was a severe humiliation for Hitler, but it did not change his mind. Hitler continued to play his waiting game. He was having troubles within the party where Gregor Strasser was urging a more elastic attitude and hoping to ge support from the more radical Nazi groups. Supported by Goering and Goebbels, Hitler maintained his firm position.

The Reichstag elected in July performed its functions for a few hours only. On September 12 it met with Goering, chairman of the largest party, as presiding officer. Papen arrived armed with a decree of dissolution already signed by Hindenburg. He had decided on a policy of attrition and planned to force election after election in the belief that the Nazis had reached their climax, would now lose votes, and furthermore would not be able to finance the expensive campaigns.

Goering pointedly ignored Papen and called for a vote on a motion of no confidence prepared by the Communists. Papen protested to no avail, so he simply placed the decree of dissolution on Goering's desk and left the hall with his ministers. The voting continued, and the motion was carried by 512 to 42. Goering called upon the government to resign, but Papen announced that the vote was illegal since the Reichstag had already been dissolved. New elections were set for November 6. The episode would have made a hilarious scene in a comic opera had not the stakes been so high.

The usual violent campaign ensued, this time accompanied by a serious strike of transport workers in Berlin. The election results justified to an extent Papen's reasoning, but showed what a long way he had to go. He almost doubled the support for his own government, it is true, but he still commanded a hopeless minority. More important was the fact that the Nazis lost about two million votes and thirty-five seats. It was the first time since the depression started that they had lost ground in an election. On the left the Communists did very well and raised their representation to one hundred, mainly at the expense of the Social Democrats who had lost much prestige after Papen seized the Prussian government from them. The Nazi leaders were seriously discouraged by the returns. They realized that their movement was of the sort that thrives on inertia; once that was lost, they could easily slide downhill. They

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realized too that their financial support would diminish with their votes. These were very tense weeks for them.

Papen felt that the election had been a personal triumph, but he now encountered a new obstacle. Schleicher regretted that he had sponsored Papen. Papen was behaving too independently, and had won his way too securely into the affections of Hindenburg. Furthermore, Schleicher decided that Papen would never be able to lead some sort of broadly national government and that in fact he seemed to be heading for a personal dictatorship based on army support. Schleicher was prepared to make a deal with the Nazis, especially with their left wing, for he had receasly become very friendly with Gregor Strasser. Schleicher had adherents in Papen's cabinet, and they persuaded Papen to interview the various party leaders in an effort to gain greater support in the Reichstag. Nothing came of these efforts, so on November 17 Papen offered his resignation with the thought that Hindenburg would continue the conversations with the various parties. There seems little doubt that Papen expected the old gentleman to fail and then recall him to the chancellorship.

Hindenburg spent several days in these conversations. On November 21 he summoned Hitler to his office and offered him the chancellor-ship with several conditions attached. Hitler demanded full powers, which Hindenburg refused, saying quite rightly that this would amount to a party dictatorship. The president now wanted to reappoint Papen, but Schleicher was firmly opposed to this; he persuaded several of the cabinet ministers to announce that they would not serve under Papen, and produced a memorandum from the army stating that Germany did not possess sufficient force to face a possible civil war with Polish intervention if Papen attempted any unconstitutional projects.

Hindenburg and Papen were outmaneuvered by Schleicher, but at a considerable cost; the president was now disgusted with him, and former favorite was faced with a cold, rancorous old man. Hinder our demanded that Schleicher assume the chancellorship and try to sale use situation. This was the last thing Schleicher wanted, for his talent was to work behind the scenes. However, on December 2 he became chancellor.

During the months of December 1932 and January 1933 the state of naked gangsterism into which the German government had fallen became even more evident. In Berlin Schleicher made desperate efforts to achieve some sort of broad support. He offered the vice-chancellership to Strasser in an effort to woo the Nazis and perhaps break up their united front under Hitler. Strasser played with the idea, but after a series of conferences with his party leaders decided not to compete with Hitler. He resigned his party offices and soon thereafter left for a vacation in

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Italy. He was little heard of again until his murder in 1934. Schleicher had no better success with the other parties. The Social Democrats were suspicious of him, and the Center still remembered how he had treated Brüning. He received an important gift from abroad when the World Disarmament Conference announced it was prepared to accept the principle of equality in armament for Germany, but even this did little good. On December 15 Schleicher announced his new program over the radio. It was devised to placate as many segments of the population as possible, and held out a good deal of bait to the middle parties and even to the left on such matters as taxes, wage cuts, and censorship. Nevertheless, Schleicher won few friends. He was too left for the right, too right for the left.

Decisive events were occurring elsewhere. Papen was furious at his betrayal by Schleicher and ready to make advances to the Nazis. Hitler was desperately worried about lack of money and the dissension in the party symbolized by Strasser. He too was in a more tractable frame of mind. The two were brought together secretly in Cologne on January 4, 1933, at the home of the powerful banker Kurt von Schroeder. Hitler and Papen settled their old feud. In essence, the Harzburg front was reestablished and wealthy steel interests started to pour money into the Nazi coffers again. No details were settled at the meeting. Weeks of tangled negotiation were required, but the foundations were laid.

Schleicher concluded that his only hope of dealing with the Reichstag, which was about to reconvene, was to hold over the head of the Nazis the threat of dissolution. So he asked the president to sign a decree. Hindenburg, however, decided not to be helpful and sternly refused the request. Schleicher, seeing that he had lost, resigned on January 28, 1933.

The next hours were sleepless ones filled with urgent bargaining. Papen seems to have been at the center of the web. He managed on the one hand to persuade Hitler to become chancellor in a coalition cabinet, and on the other to persuade Hindenburg that with himself as vice-chancellor Hitler would be restrained from a one-party dictatorship. The decision was made on January 30. Shortly after noon a new government was announced. Hitler was chancellor and Papen vice-chancellor. Only two other Nazis, Goering and Frick, were included. Neurath remained foreign minister, and Alfred Hugenberg became minister of economics and agriculture. General Werner von Blomberg, supposedly sympathetic to the Nazis, was minister of defense. The political deal was effected which later was glorified by the word Machtergreifung ("seizure of power").

That evening a torchlight procession made its way along the Wilhelmstrasse past the aged Prussian field marshal and the more youthful Austrian corporal. A new era of history had opened, the era of the Third Reich. German democracy was now dead

CHAPTER XXVII

The Nazi Revolution (1933-34)

The years of Hitler's control of Germany up to the outbreak of the war in 1939 can be divided into three sections. The first of these is the Nazi revolution proper, which occupied about eighteen months until August 1934. Although Hitler was appointed chancellor as the result of a shady political deal, he nevertheless was appointed legally and peacefully. The revolution took place after the Nazis achieved the highest positions in the German state. They effected a complete overthrow of the traditional relationships between the national government and the great fulcrums of social responsibility and power: the federal states, the political parties, the trade unions, the army, big business and industry, and the organized Christian churches. By August 1934 only the army, business, and the churches preserved any considerable measure of independence. As the years went on, even these, except for some heroic individuals, underwent synchronization (Gleichschaltung) into the total state.

One of the astonishing aspects of this overturn of society is the relative case with which it was achieved and the lack of opposition which it encountered. Aside from the fact that the Nazis controlled most of the available force and were ruthless in their use of it, this success would seem to stem in great measure from the weaknesses and divisions in German society dating back for many years and brought into sharp relief d, ring the turbulent period of the Weimar Republic. Furthermore, the weakening effects of the depression and the terrible figure of over six million unemployed in early 1933 had so cooled the Germans' lukewarm devotion to democracy that they were hardly likely to strike many blows for its preservation. The historian must also not discount the fact that the appeal of the Nazis in 1933 contained a very considerable measure of idealism. Such slogans as national regeneration and German awakening were attractive to the downtrodden, the defeated, and the resentful. Young people in particular were possessed by the idea that it was now "The for them to live in a Germany which was again strong, virile, dynamic, and clean. By the time they realized the extent of their deception, it was too late to do anything about it.

Rarely in history has a man been so underrated as Adolf Hitler. Papen and Hugenberg felt sure that their superior experience and culture plus their majority in the cabinet would make it possible to tame the demagogue while retaining the support of his enormous following. Much the same attitude was taken all along the political line. The Communists, in fact, were under orders from Moscow not to oppose the Nazis too much. Instead they were to let them have a few months of power to expose their incompetence and fatuity so that they would lose their followers to the far left and thus actually facilitate an assumption of power by the reds. The Communists continued even at this late date to treat the Social Democrats as their principal foes.

Hitler's first act as chancellor was to carry out his promise to Hindenburg to try to achieve a working majority in the Reichstag. This required support by the Catholic Center. The chancellor had a conference with the Center leader, Monsignor Kaas, which Kaas thought was just to be a preliminary discussion. Hitler, however, clearly insincere in his effort, declared after a few minutes that there was no basis for agreement. Therefore he obtained a decree from Hindenburg dissolving the Reichs-

tag and set March 5, 1933, as the date for new elections.

This time the Nazis were not reluctant to hold an election campaign; now they could control much of the state apparatus. They made it clear that this was going to be the last election for years to come. Hitler raced to and fro throughout the land, ably seconded by Goebbels with his intensified propaganda machinery, now heavily subsidized by big business. Hitler did not announce any definite program or make election promises. He devoted his time to violent attacks on Marxism and to denouncing the Weimar system for its decadence and corruption.

Although Papen held the title of commissioner for Prussia, Goering had been appointed Prussian minister of the interior. This was perhaps the most strategic spot in the whole government, for it placed the large Prussian police force under Goering's control. The burly aviator was tireless in his dismissals of opponents in the Prussian government. He established an auxiliary police made up largely of S.A. and S.S. men. He delivered tirades against the Communists and the red terror. He made it clear that in the street brawls which abounded during the campaign the police were on the side of the Nazis. The brown terror had begun. Its first big overt act was a raid on February 24 on Communist head-quarters in Berlin. Not very much of interest was found, but the newspapers the next morning reported that plans for a Communist revolution had been uncovered.

On the evening of February 27 Hitler, Goering, and Goebbels were all in B rlin, an extraordinary fact considering that the election was only a few days off. While they were at dinner, word was received by telephone that the Reichstag building was on fire. They raced to the scene to find flames high in the air over the great dome. Through the large french windows on the main floor could be seen a half-naked man with shaggy hair rushing about with burning rags in his hands. Hitler hardly paused to catch his breath, but shouted words to the effect that this was a beacon light which would show the world the depths of Community infamy.

The mysterious stranger turned out to be a young, imbecilic, Dutch Communist pyromaniac named Marinus van der Lubbe. The fact that he was a Communist gave credence to the Nazi story. The next day Hitler issued a decree "for the protection of the People and the State," giving the government almost complete power to suspend the most basic personal and civil rights and to take authority in any of the states. It went far beyond the provisions of Article 48 of the constitution. However, the Communist party was not yet outlawed. It still had one more useful service to perform for Hitler. During the next days the campaign was intensified with all the emotional overtones of the fire adding fuel

to the national conflagration.

The full story of the Reichstag fire will probably never be known, but certain facts seem to emerge pretty clearly. First, it is physically impossible for one moron with only an hour or two and some gasoline at his disposal to start a fire of such proportions in a massive stone and mahogany building. Second, there was a basement corridor from the house which Goering occupied as president of the Reichstag leading to the main building. There is hardly any doubt that a number of S.A. men went through this corridor armed with all sorts of inflammable materials and that they did a thorough job. Then they planted the innocuous van der Lubbe, who had been picked up drunk by some storm troopers a few days before in a Berlin bar.

Months later van der Lubbe and several leading Communists, including Ernst Torgler and Georgi Dimitrov, were publicly tried before the supreme court at Leipzig with Goering as witness. The Nazashad not yet suborned the German legal system. The Communists made a fool of Goering and all were acquitted except van der Lubbe, who was beheaded. However, that was not important; by then there were other things to worry about. The Reichstag fire more than served its purpose.

The last relatively free election in Germany until after World War II produced rather disappointing results for the Nazis. Although they increased their votes by five and one half million, they did not achieve

the majority for which they ionged; they polled seventeen out of thirtynine million, just under 44 per cent of the total vote. However, if the Nationalist votes were added to the Nazis', the two together had a small majority; but the Nazis were not concerned about that. As soon as the eighty-one scats won by the Communists were disqualified, the Nazis alone would have their majority. This was to be the last service to Germany of the Communist party.

March 21, 1933, was set for the meeting of the Reichstag to be held at the Garrison Church at Potsdam, tomb of Frederick the Great and the central shrine of the old cult of Prussian militarism. It would be difficult to imagine a greater contrast from the inception of the republic at Weimar. To the flag-bedecked royal town hobbled in full regalia the remains of the senior officers of imperial Germany, led by bushy old General von Mackensen wearing his shako bearing the skull and crossbones of the death's-head hussars. Hindenburg in his field marshal's attire tottered from his car and was met by the new chancellor, dressed not in his corporal's uniform but in cutaway and striped trousers. Inside the church the relics of the past sat across from the masters of the present, the Nazi delegates in their brown uniforms and swastika decorations. The ceremony was brief. Hindenburg read a dedication of a new Germany, and Hitler emphasized the continuity between Hohenzollern and National Socialist. When the field marshal visited the crypt, guns fired in salute for miles around. The rest of the day was spent in parades, demonstrations, and concerts. The bridge was connected from 1918 to 1933 with the interval forgotten. The Nazis spoke of this occasion as the Day of National Regeneration.

On March 23 the Reichstag met again, this time for business, in the Kroll Opera House in Berlin. However, there was only one piece of business, the Enabling Act. This act provided that for four years the government would have the right to decree any law or treaty independently of the Reichstag. It was an invitation to the Reichstag to vote itself out of effective existence. Since it was a constitutional amendment, it needel a two-thirds vote. Therefore Hitler had wooed the Center, even giving Monsignor Kaas a written promise that he would always act legally. At the meeting Hitler called for the passage of the bill, even threatening that the National Socialists would go ahead regardless of the result of the vote. Otto Wels spoke for the Social Democrats and announced that his party would vote against the measure. It was a brave gesture, but it infuriated Hitler, who jumped back on to the rostrum and lashed out against the socialists. The other party leaders spoke, and the vote was taken amid tumult from the galleries and the streets. The only opposition came from ninety-four Social Democratic members.

Everyone else voted for the act. The Reichstag ceased to exist except as a ceremonial body which Hitler addressed from time to time on important policy developments.

The passage of the Enabling Act was the signal to go full speed ahead. It provided the legal basis for all subsequent acts. Hitler had outwitted his non-Nazi colleagues in the cabinet, for now he could act on his own authority without even the approval of Hindenburg. From this time on there was to be no halt.

In the spring of 1933 the Nazis initiated a thoroughgoing purge from German government and society of anti-Nazi groups. The purge was carried out through the whole nation but was particularly noticeable in Prussia, where Goering conducted it with ruthless brutality. By the national Civil Service law of April 7 Jewish officials of all levels could be retired. The phrase "concentration camp" was added to the world's language of despair, as Jews, Communists, Social Democrats, and other anti-Nazis were cast out of the government, the teaching profession, and other liberal professions, and sent to endure an existence of sadistic ferocity such as the world has rarely witnessed. As early as April 1 a boycott was ordered against all Jewish businesses and professions; the Jews were gradually deprived of all civil and political rights, and often forced to pay large indemnities to maintain their bare existence from day to day. The brown terror of arrests, beatings, imprisonment, and shootings was on full rampage and shocked civilization; it was efficient and thorough.

More important than the outrages committed against individuals was the Nazi determination to eradicate institutions. Individuals are ephemeral, but institutions endure. During 1933 the Nazis launched attacks against three major institutions—the federal states, the political parties, and the trade unions—all of which were potential focuses of opposition. By the end of the year all three were crushed.

The first big step to eliminate the autonomy of the federal states was taken six months before Hitler became chancellor when Papen seized control of Prussia in July 1932. He rendered the Nazis an important service in advance.

On March 31 Hitler ordered that all the parliaments of the states be dissolved and reconstituted without elections, giving the parties in each state (except the Communists) the same proportion that they had in the Reichstag. A few days later he appointed governors (Reichsstatthälter) for each state, in whom reposed all effective executive authority. The Statthalter was usually also the Gauleiter or local party chief; thus the unification of state and party was advanced. Hitler named himself Statthalter in Prussia, but appointed Goering minister-president to do

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expected, Hitler was wise enough to select the old free corpsman, General Ritter von Epp, who was popular there. By January 1934 the liquidation of the states was completed by the abolition of the Reichsrat or national upper house, which had been intended to represent the states. Although the Nazis paid much lip service to the unique qualities of the various Germanic areas and encouraged folk dancing and local costumes. Germany was ruled from Berlin.

The abolition of all political parties except the National Socialists occurred rapidly. The parties of the left were the first to disappear. The Communists were not allowed to seat their members in the Reichstag. In fact, most of them were in concentration camps within a few weeks. At the end of May the government simply confiscated the property of the party. The Social Democrats seem to have imagined that they could continue as a legal opposition. They did not yet know Hitler. On May 10 their property and funds were confiscated, and some weeks later the party was officially banned. It might have been expected that the center and right-wing parties, some of which actually had representatives in the cabinet, would have been able to endure. But in late June the Nationalist party simply dissolved itself, and Hugenberg retired from the government. In early July the Center and Bavarian People's party ended their careers voluntarily. By July 14 Hitler was able to decree that the Nazi party was the only legal party in Germany and to prescribe a penal sentence for anyone who tried to start another. It seems hard to believe that institutions with the traditions and prestige of the German parties would simply surrender without a fight. The fact is that they did.

Much the same was true of the trade unions. The socialist unions had been one of the most powerful units in German society; in 1918 and 1919 they almost controlled Germany. During the depression they lost members, but their position still seemed secure. Hitler eleverly decreed May Day, the traditional socialist holiday, as a national holiday and addressed a large rally of workers. The next day Nazi forces confiscated and occupied the union offices and sent many of the leaders to prison. The union assets were transferred to a new institution called the German Labor Front under the leadership of an ardent Nazi, Robert Ley. All German workers became members of the Labor Front. The old techniques of collective bargaining were abolished, and the state assumed direct control of labor-management relations.

Politically speaking, Hitler was in almost complete control of Germany by mid-1933. He had eliminated his opponents outside the party with a brutal speed and a lack of opposition, both of which were amazing. During the year from the summer of 1933 to that of 1934 he had to con-

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duct a more difficult struggle, this time against elements with... The arty interested in pushing the revolution further and in directions of valich Hitler disapproved. The struggle was directed against the "socialist" groups in the Nazi party who found their principal spokesmen in the S.A. leadership and in particular in its chief of staff, Hitler's longting associate, Ernst Roehm. Their aim was an attack on two remaining important constellations of power: business and industry, and the armounth wanted to wipe out the strongholds of what they called the "reaction." Much of the detailed story of the yearlong crisis is obscure and probably will remain so, but sufficient facts have emerged for a fairly coherent account.

By the spring of 1933 the S.A. numbered between two and three million men. Some of them were the "old fighters" who had come into the movement at its start and remained loyal to it over the years. Many were later acquisitions—unemployed, unsuccessful, or ambitious—who saw in the brown shirt formation the path to riches. During the early months of the regime they were the heroes; they carried out the actual work of the terror, the raids, and the confiscations. By July their work was almost done. They looked around and saw that they were without personal possessions and authority, while many non-Nazis were in important places. In particular, they noticed that the old aristocracy of German industry had not been budged from its high estate and was in fact operating closely with the new government.

The latent socialist tendency within Nazism began to make itself articulate. Goebbels, who in March had become minister for propaganda and public enlightenment and who, though personally loyal to Hitler, had always been associated with the left wing of the party, filled his editorials and speeches with invective against capitalistic evils and with pleas for the downtrodden. Some of the early party leaders, men like Gottfried Feder, tried to secure the adoption of their lower-middle-class principles, which had made up the party credo in the early twenties. Even Gregor Strasser emerged somewhat from obscurity.

Hitler was opposed to this tendency in 1933 as he had been in 1926. He was no economist; he was little interested in economic theory. He was a manipulator of men and so far had had remarkable success with the lords of industry. He was wise a light to recognize the immense power of the German economy as then constituted. His plan was to harness and control the existing leadership rather than to venture on a new untried revolutionary experiment which might not be successful. In this thinking he was supported by Goering and Hjalmar Schacht.

Even more of a worry to Hitler than the economic attitude of the S.A. was its designs on the army. The S.A. was now twenty times as large as

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the army; it had carried the whole brunt of the Nazi revolution, from which the regular army had held deliberately aloof. Roehm, first and always a fighter and military man, would have loved a position of importance in the regular army. He would have enjoyed social recognition from the stiff-necked Prussian officer corps, which his social background, his wild and perverse life, and his rough personality had always denied him. He felt that the army and S.A. should be merged into the new large German military establishment, with the S.A. free corps attitude in control and a wild, free, all-German spirit succeeding the old narrow-minded bemonocled ethos.

Once again Hitler was in sharp opposition. He respected the army from his front-line days; more important, he remembered his defeat in 1923 when he had tried to pit the S.A. against the army. He also had a sound political understanding of the prestige attached to the army and in particular its importance to Hindenburg, who was not yet completely negligible. Time and again he asserted that the army was the legitimate bearer of arms and that the S.A. had as its function internal political matters only. He had to tread a narrow path.

The winter of 1933-34 was filled with maneuvering among the several groups. Hitler tried various techniques, including a kind of bribery. For example, he gave Rochm a seat in the cabinet at the same time that Hess received one. Even then Rochm would not be quiet. There seems little doubt that Hitler was constantly fed anti-Rochm sentiments by Goering and also by Heinrich Himmler, who chafed at the fact that the S.S. was technically subordinate to the S.A. and saw in the struggle an opportunity to increase the prestige of the S.S. and thus his own.

The situation was complicated by the evident fact that Hindenburg had very little time to live. The doctors made this clear to Hitler, for whom it was an extremely important matter. Hitler had determined to succeed the old man in the functions of the presidency, but knew that this would require the support of the army because of the need for a new oath of allegiance. The crucial day seems to have been April 11, 1934.

On that day Hitler went aboard a naval vessel to watch maneuvers. In the party were General Werner von Blomberg, minister of defense, General Werner von Fritsch, commander in chief of the army, and Admiral Erich Raeder, commander in chief of the navy. There is reason to believe that on that occasion Hitler made a deal with the military that they would support his succession to Hindenburg if Hitler would quiet the S.A. and not touch the army's sacrosanct position.

The events of the following weeks are obscure and confusing, especially the workings of Hitler's mind. It eventually became clear to him

that Roehm was the key to the whole triple problem: the position of the army, the socialist "second" revolution, and the imminent death of Hindenburg. The days of June were filled with inventing a plausible story of a coup d'état supposedly plotted by Roehm. Strasser, Schleicher, and others to take control of the new Nazi state and lease it in their sinister direction. In the meantime the S.A. was ordered to go on leave during July without uniform, and Roehm himself left for a convalescent vacation at a hotel in the Bavarian Alps. Tension mounted high in the capital.

June 30, 1934, was the blood-soaked day. The events of the blood purge, or the night of the long knives as it is sometimes called, are familiar. On June 29 Hitler and Goebbels flew from the Rhineland to Munich. During the night they arrested a number of S.A. leaders. In the early morning they drove to Roehm's hotel, where they found him still in bed. Some of his companions were shot on the spot. Roehm and others were returned to Munich, where they were shot as the day went on.

In Berlin Goering and Himmler were in charge. There, too, numbers of S.A. leaders were rounded up in barracks, where S.S. firing squads shot them at intervals during the day and night. No accurate figures are available, but the number killed was certainly upwards of one hundred, many of them well-known people. The carnage was not limited to the S.A. Among the list of the dead were Gregor Strasser, General von Schleicher and his wife, Papen's secretaries, and several of the Catholic Action leaders. By some mysterious fate Papen himself, who had given an anti-Nazi speech some days before, was spared. A figure from the past was General von Kahr, who in 1923 had put down the beer hall Putsch; his aged and battered corpse was found in a swamp outside Munich. The ferocity of the attack is shown by the fact that a newspaper man named Willi Schmidt was killed by mistake by S.S. men looking for another Willi Schmidt, who was listed as a victim. Panic and uncertainty reigned throughout Germany.

Two weeks later on July 13, 1934, Hitler called together the Reichstag to hear his version of the purge. He gave a long speech in which he alleged that Roehm had been planning a coup to depose him and thus had forced him into violence. He attacked the behavior of the S.A. leaders, stressing Roehm's homosexuality, of which he must have known for years. Hitler promised that the revolution was now over.

If it is true that Hitler was hurried into the purge by the approaching death of Hindenburg, he was just in time. On August 2, 1934, the old soldier died at his estate at Neudeck. The army lived up to its promise. Hindenburg was dead only a matter of minutes when it was announced in Berlin that the offices of president and chancellor would be merged. Shortly afterwards the armed forces took a new oath. This oath

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was personally to Adolf Hitler, the leader (Führer) of the German land and people. Hindenburg was buried with great state in a crypt at the foot of the monument to his victory at Tannenberg.

On August 19, 1934. Jerman people were invited to register in a plebiscite their approval of the new situation. About 88 percent of the population indicated approval. The Nazi revolution was over. The Führer was in complete control.

The Nazi State to 1938. I, Political and Military

The years from mid-1934 to early 1938 are the years of the consolidation of the Nazi dictatorship. Narrative history almost ceases except in foreign affairs, and the historian must analyze the pattern as it develops in the various spheres of human activity. Gradually and sometime's unobtrusively the net tightened around the German people until by 1938 the total state had for all practical purposes been achieved.

An important key to understanding the political relationships is the position held by Adolf Hitler. He occupied three separate functions, that of chancellor, party leader, and president. After he inherited the presidential office, he never used the title; it smacked too much of republicanism. At first he was referred to as leader and national chancellor; after the war started, simply as leader (Führer). In fact, he was of greater significance than the combination of his three functions would suggest. He assumed a sort of magico-religious position. He embodied the collectivity of the racial Germanic urge for existence and power. He was the court of last resort. He was the law. Otherwise intelligent people, including foreigners, were held in thrall by his eyes, his personality. They would answer questions on some outrageous Nazi aberration with paragraphs beginning with the words, "Adolf Hitler has said. . . ." That was the end of it. Humble Germans identified themselves with their leader, who incarnated what Plato might have called the archetype, or Rousseau, the general will.

Hitler's extraordinary position in the eyes of the faithful was partly rationalized by the "principle of leadership" (Führerprinzip). This principle established a hierarchy of command such that each person gave unconditional obedience to those above him and was entitled to the same from those below. No more elections were held in Germany. All officials

of the pyramid was Hitler.

In fact Hitler was at the apex of several pyramids. The party and the state were not one, though they impinged and overlapped heavily upon each other. It is difficult for an Englishman or an American to grasp the concept of the totalitarian party because it is in no sense equivalent to the British or American political parties. In fact a sharper meaning is rendered by the word movement. Admission to the party was an invitation to exercise the vocation of leadership. The party members constituted a leaven in the dough of the society, an elite, a pattern for the led. At least until the war the party was kept relatively small so that the members could be highly qualified in Nazi terms. The party can be thought of as the dynamic or male force; the state, as the static or female constraint.

Immediately below Hitler on the party ladder came the Reichsleitung ("national leadership"). By the end of the war there were about forty Reichsleiter. Some of them held important state positions; others held none. A few did not even have a specific party position. Some of them were well known throughout the world: Goering, Himmler, Goebbels, etc.; others were little known even in Germany but commanded important spheres of influence, such as the party courts, its finances, or its studies of foreign affairs. In fact some of the Reichsleiter headed divisions which paralleled the work of state ministries. Neither the party nor the state was symmetrical or rationally organized; both were the result of a series of ad hoc creations, of which some were tailored simply for one man.

The next level below the national leadership was the previncial (Gau) leadership made up before the war of just over thirty Gazleiter. These men were often but not always identical with the Statthälter, who were of course in the state hierarchy. Some of them were well known, e.g., Goebbels, who was Gauleiter of Berlin; others were known only locally. It was their duty to receive orders from party headquarters in Munich or from the Führer in Berlin and see to it that they were enforced in their respective Gaue. Beneath them were whole armies of district, municipal, local, and block leaders, who brought the gospel and commandments of Nazism to every individual in the nation.

The state hierarchy was of course not entirely the creation of the Nazis. Much of it carried over from the republic and indeed from the empire, and many of the bureaucrats had been civil servants for a long time. In fact, it is extraordinary how much continuity existed. If a man were not a Jew, a socialist, or an overt opponent of National Socialism, he had a good chance of keeping his job. An outstanding example of

this is the influential Erich Meissner, head of the presidential chancellery and thus immediately under Hitler, who had held the same position under both Ebert and Hindenburg.

At the top of the state ladder were the ministers. Naturally, many of them were Nazis, but the remarkable thing is that a considerable number (e.g., Papen, Neurath, Schwerin-Krosigk) were not. Hitler tended to think of them as technical experts in their departments and not as political advisers. Full cabinet meetings became rarer and rarer, until during the war they were hardly ever held. Hitler liked to make his decisions alone or with a small group of his intimates. He would usually hear advice or conflicting opinions, then retire by himself and announce the decision later; and that decision was binding.

There emerged from this system what is often called the dual state, a duality of state and party paralleling each other from the Führer at the summit down to the meanest functionary of either. However, no one should assume that it was a neat or even premeditated parallelism. The overlapping of nominal authority was hardly credible and became even more confusing during the war when economic controls constantly had to be tightened and when an empire all over Europe had to be governed. By 1945 it was almost impossible to locate authority, certainly not on a neat chart of organization. The answer was that authority lay with Hitler and with the men in whom he chose to repose it at any given moment. In spite of all the proliferation of organizations and officialdom, and all the lip service paid to the leadership principle and the united action of the people, Nazi Germany was one of the most intensely personal governments that the world has ever seen.

During this middle period of Hitler's rule the army was one institution in Nazi Germany which seemed to be sacrosanct. Hitler lived up to his statement after the purge of 1934 that the regular army would continue to control Germany's military force. He needed the army officers during these years more than they needed him. They were essential to create the great armed force which Hitler planned. Step by step, and rather more rapidly than some of the more conservative generals wanted, they were given ever-increasing latitude until by 1938 the German military establishment was well on its way to becoming the formidable instrument of the war years.

From the earliest days of his political career Hitler had inveighed against the Treaty of Versailles. Now that he was in control, it was to be expected that he would try to implement his invective. Reparations were already a thing of the past; there was no possibility at the moment of risking war to restore the old frontiers; the military clauses seemed to be the one area in which repudiation was feasible.

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The long-planned World Disarmament Conference had been sitting in Geneva since early 1932 without much achievement to its credit. The German delegation took the position that according to the treaty German disarmament was to be only a-prelude to-world disarmament. They about disarming, Germany was entitled to build up her forces to a level of equality with her peers. The other nations recognized that this argument had some force, and in December the conference admitted "in principle" Germany's right to equality.

This was not enough for Hitler; he was in a hurry. During the 1933 session the Germans insisted that the S.A. must not be counted as effectives in granting increased numbers to Germany; they also demanded that they should start right away to build up to equality. In June the conference adjourned for several months. In October Hitler took his first major step in foreign policy. On the fourteenth he withdrew his delegation from the conference and announced Germany's resignation from the League of Nations. It would be hard to think of a sharper reversal of the Stresemann policy. The following month, in the first of Hitler's plebiscites, the German people were asked whether they approved of these two steps; 93 per cent voted yes.

The year 1934 was devoted mainly to the quarrel between the army and the S.A. which culminated on June 30, but there can be no doubt that plans were being rushed for the expansion of the army and navy and the creation of an air force. The culmination of Hitler's attack on the military clauses of Versailles came on March 16, 1935, when he simply abrogated them unilaterally. On that date he returned to the old prewar policy of the conscription of all young men, who now had to spend a year in the armed forces. To show the change in spirit he even altered the name of the army from the Weimar word Reichswehr to the new Wehrmacht.

World opinion, not yet accustomed to Hitler's tactics, was appalled at this unquestionably illegal action. There is no doubt that Britain and France could have forced Hitler to withdraw from his new position if they had chosen. However, they did nothing except to protest and to start to negotiate with Germany on nonaggression pacts, limitations of armaments, etc. Nothing came of these discussions except a naval treaty with Great Britain.

The following months were hectic for the army high command. It is not an easy matter to transform an army from one hundred thousand to six hundred thousand men almost overnight. The logistic problem alone is a tremendous one, to say nothing of the problem of training so many raw recruits simultaneously. Although the *Reichswehr* had been

developed by Seeckt as a nucleus for eventual enlargement, it was a number of months before the army was actually admitting all the new personnel to which it was entitled. The munitions industry had started to increase its productivity even before 1935, but there were many problems here too in the acquisition of raw materials, retooling, and rapid expansion. However, the work went on without cease.

Almost exactly a year after the return of conscription Hitler took his next big military step. He took advantage of the fact that Europe was in the midst of a crisis in international affairs, the Italian invasion of Ethiopia. On March 7, 1936, he repudiated another part of the Treaty of Versailles and the entire Locarno system by announcing the remilitarization of the Rhineland area to the Pelgian and French frontiers. The Allies had ended their occupation of this territory in 1930. This was a very daring step; it touched France at her most sensitive spot. The Germans were aware of their daring, but received no French opposition. Once again Hitler had gambled and won.

Activity in the air paralleled activity on land. From the moment the Nazis took control, interest in aviation advanced by leaps and bounds. Boys were encouraged to study aeronautics, flying clubs were founded, glider races were frequent, and commercial aviation was expanded. Hermann Geering, the old war ace, was able to find time from his conquest of Prussia to look about for a future staff for the air arm and to cheer on air-minded youngsters. It was an open secret that Germany was going to establish a military air force. Britain and France seemed to accept the idea in advance. The official creation of the air force (Luftwaffe) occurred a few days before the announcement of conscription in 1935. Goering became commander in chief in addition to his other responsibilities. Within a year the air force was on a war footing and ready to make its first live experiments in Spain.

The navy was to an extent a stepchild in Nazi Germany; Hitler does not seem to have understood the principles and importance of naval warfare. However, it shared in the expansion. In fact, after the announcement of the abolition of the armament restrictions, incredible though it may seem, Great Britain made a naval treaty with Germany whereby Germany was entitled to a surface navy one-third as large as the British and to a submarine fleet equal to the British. Plans were immediately put into operation for two big battle cruisers (the eventual "Scharnhorst" and "Gneisenau") and two super battleships (the eventual "Bismarck" and "Tirpitz"), as well as a respectable number of smaller surface vessels and submarines.

The regular armed forces were not the only reservoir of trained manpower. The S.A., tamed and shorn of its imperialistic ambitions, re-

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Lutze. The S.S., now independent of the S.A., already had several armed battalions which were to grow into the redoubtable armed S.S. (Waffen S.S.) of the war. By 1936 Himmler, in addition to being leader of the S.S., became chief of the German police, another formidable armed group. In addition, there were the Labor Service (Arbeitsdienst) and other paramilitary organizations which, at need, could swell the Wehrmacht.

Hitler's birthday, April 20, 1936, was a happy day for the high-ranking officers. On that day the Führer promoted the minister of defense, General Blomberg, to the rank of field marshal, the first time that rank had been granted since the war. The three commanders in chief also received promotions, Fritsch and Goering to colonel general and Raeder to general admiral.

Germany was fast becoming an armed camp.

The Nazi State to 1938. II, Economic and Social

There can be no question that the promise which won Hitler the most votes in the black depression days was to end unemployment. The figure of six million unemployed was ferocious. This was a challenge which had to be met immediately, and the Nazi government lost no time. The astonishing fact is that in a very short period the promise was redeemed and Germany approached full employment. However, this statement must be hedged about with qualifications in view of the methods used to achieve the goal. Certain classes of society (e.g., Jews, Communists, etc.) were declared incapable of filling certain sorts of jobs, and in many cases positions were created for jailers to control them in concentration camps. Every effort was made to remove women from employment; there was no element of feminism in Nazism, which instead preached a traditional social order dominated by males. In any time of unemployment one of the groups to suffer most is that composed of young men who have just completed their education and cannot find jobs. The Nazis took care of these people by creating the Labor Service (Arbeitsdienst). All young men were required to spend six months in camps in the countryside working on such projects as reclamation of land, prevention of erosion, etc., which were allegedly noncompetitive with private industry. After 1935 they then spent their period of conscription in the armed forces, an effective method of keeping them out of the labor market. Finally, the new impetus given to normal industrial production by rearmament, road building, and public works further lessened the number of unemployed.

In fact, during the mid-thirties Germany enjoyed a boom period. The industrial plant that had been built during the Weimar years was now producing for Hitler and the Nazis. Credit was extended freely and the production figures mounted steadily. Germans had lost their freedom;

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they had exchanged it for a sort of economic security that had been lost during the depression.

The government and numberless speakers announced as their economic goal the achievement of autarky or self-sufficiency. They deplored the earlier dependence of Germany on other nations and promised that she would stand on her own feet. It was made clear that this aim would require much sacrifice and deprivation from the population, but this was glorified as a heroic effort by such slogans as "guns before butter" or "Gemeinnutz liber Eigennutz" ("the general good before the individual good"). In fact, the goal of autarky for Germany was impossible because she was not overly endowed with natural resources except for coal. Since the heavy emphasis on production was on capital goods rather than consumer goods, it was obvious that Germany was going to have to import huge amounts of raw materials. Furthermore, because the government was always conscious of the likelihood of war, there would have to be large-scale stockpiling of strategic materials. These needs raised difficult problems of financing and payment.

One of the most astounding aspects of the whole Nazi story is the way in which the Germans managed to finance their operations. Shortly after he assumed power Hitler reappointed Hjalmar Schacht to his old position as president of the Reichsbank, and some months later, after Hugenberg's resignation, Schacht also became minister of economics. He had several basic problems to surmount. In the first place, Germany's gold reserves were dwindling rapidly and frighteningly, until it was hardly possible to speak of her being on the gold standard. On the other hand, the government insisted on importing great quantities of raw materials, a program that was bound to give Germany an unfavorable balance of trade, 20 matter how much effort was devoted to building up exports. Schacht maintained his reputation for wizardry by devising a number of novel expedients.

He established a strict control of all German currency and international trade. No one could take out of Germany more than ten marks without special permission. No one could import anything without approval. Every possible effort was made to increase German holdings of foreign exchange: exports were increased as much as possible, tourists were encouraged to visit Germany by granting them extremely favorable rates for money bought outside, and foreign firms were required not to remove their assets from Germany but to spend them there.

The German government made barter agreements with other countries to which they sent German finished goods in return for raw materials. In particular, eastern Europe, the Near East, and Latin America were chosen for these treaties. The foreign countries soon found them-

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selves in a state of bondage to Germany or glutted with unsaleable merchandise, e.g., thousands of Leica cameras. The treaties had obvious political implications and paved the way for Hitler's conquest of the Balkans, which until then had been dominated by French influence. A combination of unorthodox devices and economic daring made possible German recuperation and rearmament under the Nazis.

By 1936 Hitler came to the conclusion that the period of recovery was overand that new goals had to be instituted. He further seems to have few mat it was time for the government and party to tighten their control over industry. Up to that time business and industry had not been much disturbed by the new government, except of course for Jewish businessmen, many of whose firms had been "Aryanized." Now it was time to take off the gloves, at least partially. Accordingly in October Hitler decreed the Four Year Plan for the German economy and appointed Hermann Goering head of the Four Year Plan organization as a sort of economic dictator. Schacht took this appointment as an affront to him and his ministry.

The year 1937 was the decisive year in which Nazi Germany moved from the defensive to the offensive in the international sphere. The economic reflection of this change of course is seen in the replacement of Schacht by Walther Funk in the ministry of economics. Although Schacht was willing to attempt daring expedients and to tread the doubtful side of the line of orthodoxy, he was basically an old-fashioned economist, conservative as compared to some of the Nazis who were prepared to flout all the laws of classical economics. He was also apparently willing to tell the Führer that some of his wildly ambitious plans were impossible to achieve. As a result, in November 1937 the more pliant party man, Funk, replaced Schacht, although Schacht remained president of the Reichsbank until 1939. At about the same time the word autarky was heard less frequently and replaced by Weinrwirtschaft ("defense economy"). The decision for aggression was made.

It is very difficult to decide what the Nazi economic philosophy really was. Probably there was none, certainly not a fully developed, coherent philosophy. In this realm, as in so many others, Hitler was an opportunist, an improvisor. The old "unchangeable" twenty-five-point program of the early days is no guide for the analysis. It had called for extensive nationalization and freedom from the "slavery of interest." After 1933 very little nationalization occurred except in the case of Jewish-owned enterprises, in which the usual procedure was to sell the businesses or to surrender them to some dependable non-Jew as trustee. The general tendency was in the direction of monopoly.

Some have insisted that Nazi economics was a sort of state socialism.

This is undoubtedly true in some aspects, but it is far from being the whole story. Most of German industry remained legally private. Men like Krupp, Thyssen, and Röchling remained at the head of their respective enterprises, unless, like Thyssen, they committed political offenses. In fact, they were heaped with honors and new holdings. However, at the next level it is instructive to note the infiltration of boards of directors by deserving Nazis: government officials, Gauleiter, etc. The network of interlocking directorates was impressive. On the other band, the government by no means always refused to establish direct ewaership and control of industry. This was particularly the case if the industry in question were one which might not be immediately profitable, but would be useful for the wartime economy (e.g., the utilization of low-grade ores or the synthetic fuel industry). The principal example of direct government participation in industry was the huge Hermann Goering combine, which by the end of its career managed operations ranging from steel mills to the control of canal-boat shipping. Yet even in this case ownership was really vested in the party rather than in the

As the war drew near, and especially during the war years, it becomes more difficult to apply the phrase private enterprise to the German economy. It is of course normal in any country in the conditions of modern warfare for the government to dominate industry. In Germany the situation was more far-reaching than elsewhere. The proliferation of control offices, chambers of commerce, and officialdom of one sort or another resulted in a bureaucracy which was very difficult to penetrate. The businessman was plagued by a series of import quotas, raw material allocations, price controls, limits on output, labor regulations, and the like, which must have made him feel bound and fettered in every direction. He was for all practical purposes a servant of the state. Perhaps the best phrase to describe the economy as fully developed under the Nazis is "command economy," a term used by Franz Neumann in his remarkable book Behemoth (New York: Oxford University Press, 1944).

As management gradually lost control of its operations, so even more rapidly did labor. The German Labor France, which replaced the old unions in 1933, became a patent fraud as far as the protection of labor was concerned. It was a party "formation" rather than a governmental agency and became an instrument for the control of individuals and for Nazi indoctrination. Before long it included all German salaried workers except for the civil service. Its true character became clear in 1936 when all the basic functions of a union (wages, hours, etc.) were transferred to other agencies, mainly the ministry of economics. Much was

made of groups concerned with the uplift of labor, such as Schönheit der Arbeit ("beauty of labor") which persuaded employers to such good deeds as decorating factories with gardens and window boxes or installing modern bathing facilities. Even more lauded was the Krajt durch Freude ("strength through joy") organization, a part of the Labor Front, which provided leisure-time entertainment and vacations for the chosen few, including trips on special cruise ships to countries friendly to Germany.

One of the most telling methods of controlling labor was the workbook. Every worker had to have one. It contained the basic facts of his life, the jobs he had held, why he no longer held them, and a statement of any acts of insubordination or political deviation. A German worker could get a job, but he had to be careful to keep it or to get another.

Other classes of society were watched and guided at every step just as much as labor. A list of all the National Socialist associations for various groups of the population would fill many pages. There were Nazi associations for civil servants, teachers, students, women, farmers, lawyers, doctors, etc. Each devoted itself to the same task: control and indoctrination at the intellectual level deemed suitable by the propaganda ministry.

In addition to the various professional leagues, there were the general associations for the whole population which kept a careful eye on all Germans. Needless to say, tremendous emphasis was placed on the indoctrination of youth, the reservoir of the future party. Most of this was under the supervision of the Reichsjugendführer ("national youth leader"), Baldur von Schirach, later Gauleiter of Vienna. From the moment of dawning consciousness a child was subject to indoctrination. His fairy tales and schoolbooks were all slanted to develop a love for Führer and Germany. When he was ten, he was eligible to join the uniformed Hitler Jungvolk ("young people"), or, if a girl, the Bund deutscher Mädel ("league of little German girls"). Four years later he almost had to join the Hitler Jugend ("youth"), which had constant meetings, went on camping trips, and took part in Nazi festivals, often at times when the members would otherwise be at church. Next came his months in the labor service followed by the armed forces. Then he might join the party, and perhaps the S.A. If he were a fine Nazi physical specimen, he might be admitted to the ranks of the S.S. If he were among the most perfect, he might be selected to attend for four years the course at the Ordensburgen ("castles of the order"-the reference is to the medieval Teutonic Knights), where in romantic spots, famous for their connection with some heroic moment in German history, he

would be trained to be one of the leaders of the future. If he were not eligible for any of these honors, he would enter vocational work, still under the watchful eye of the party.

A similar gamut of organizations was available to girls, although the antifeminism of the Nazis prevented the development of these organizations as completely as their male counterparts. Women were under the direction of Frau Gertrud Scholtz-Klink, the *Frauenführer* ("leader of women").

Obviously one of the most important influences on youth is the educational system. The Nazis lost no time in synchronizing it. This action had important implications because it brought the party squarely into conflict with the churches, which had always been an important influence on education. However, it was too basic a matter for the Nazis to neglect. They had to achieve an education in Germany which would be technically competent but also nationalistically German and ideologically Nazi. Therefore a purge of teachers and curricula was high on the party agenda. Jews, Communists, and socialists were dismissed out of hand and replaced by "clean" German racial types. The textbooks and curricula were revised to present the Nazi outlook in its completeness. The crucifix on the wall of a Catholic classroom was replaced by a photograph of the Führer.

Even the austere and aloof German universaces felt the impact of National Socialism. They had always been corporate bodies, supported by the state but sacrosanct in their autonomous self-government. The faculties actually ran their institutions and elected their own *Rektoren* ("presidents"). This happy arrangement had to end; the *Führerprinzip* was to prevail. Despite some resistance from the professors, the ministry of education appointed new officials. Jews and opponents of the regime were either dismissed or resigned voluntarily and in many cases left Germany to the immense advantage of their adopted nomes. Their roll call is a roll of honor of German learning.

Probably the most appalling single act in the muzzling of learning in Nazi Germany was the famous burning of books in the courtyard of the once-great University of Berlin in late 1933. While students danced around the pyre waving swastilla flags and singing Nazi songs, hundreds of banned books from the university library were consumed by flames. The list of books is a partial roster of German greatness. Not only works by Jews and Marxists were burned but, to give only one example, the works of the distinguished non-Jew and non-Marxist, Thomas Mann. It is hard to imagine a longer step in the return to barbarity. The Nazis were thorough in pursuit of their sim.

All these formations, organizations, and leagues were inspired by a

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sound psychological principle perverted to evil ends. The principle was the establishment of a community of thought, word, and deed. The common flags, songs, uniforms, meetings, and indoctrination gave to the individual a sense of identity, mutuality, and belongingness that he had missed in the impersonal and businesslike atmosphere of the Weimar Republic. Human warmth was cultivated to produce inhuman brutality. This is unquestionably an important factor in accounting for the success of the Nazis in winning popular support. Hitler was able to respond to the old longing of the free corpsmen for a community of destiny, but the quality of that destiny became fully clear only in the courthouse in Nuremberg in 1946.

CHAPTER XXX

The Nazi State to 1938. III, Religious and Cultural

It seems no exaggeration to insist that the greatest challenge the Nazis had to face was their effort to eradicate Christianity in Germany or at least to subjugate it to their general world outlook. Here they were not dealing with economic freedom for which acceptable substitutes could be offered, nor even with political liberties for which a degree of security could be bartered. They were attacking the deeply spiritual traditional values, ingrained for over a thousand years, of a people which had shown itself profoundly religious and willing to fight for its faith. The French and Russian revolutionists could claim with some justification that the churches which y fought were corruptly allied with an evil old regime. This was not the case in Germany, where the churches had not been intimately affiliated with the Weimar system. Hitler was wise enough to realize that in this area he could not use the overt direct attacks which had been so successful against the Jews, the Communists, the unions, and even the political parties.

Yet there was no way to avoid the conflict. Christianity is itself a total way of life, based on supernatural authority and dedicated to a charitable brotherhood of man which transcends all political and racial frontiers. Nazism also was a total ideology, based on faith in the Führer and geared to a brotherhood of only Germans and "Aryans." with contempt and violence for all others. There could be no question of coexistence without such dilution that one or the other would lose its whole purpose and function.

During the years before 1933 Hitler did not say much on the subject of religion. It was known that he had been born a Catholic, but there was no record of his ever having taken part in religious observances. One of the twenty-five points of the party program called for "positive Christianity," but it was anyone's guess what that meant. Hitler had



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VERDICT ON SCHACHT

A Study in the Problem of Political "Guilt"

by EARL R. BECK



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From the course of later history it is clear that this first effort for a coup d'état on the part of Witzleben and myself was the only one which might have brought a change in the fortunes of Germany. It was the only effort which was planned and prepared at the proper time. The war had not yet begun; there was the best opportunity for a peaceful settlement with our European neighbors. A year later Germany found itself at war, a fact which made any military participation in an overthrow (of Hitler) exceedingly more difficult.

Hjalmar Schacht¹

¹Abrechnung, 18-19.

IX. CRITICISM AND CONSPIRACY

In 1938 Hjalmar Schacht, the conservative banker with the high stiff collar, became a conspirator against Adolf Hitler. Like many conspirators before him, he moved hesitantly, still questioning whether the next step should be forward or backward. It was neither cowardice nor treachery which resulted in his uncertainty. Nor was it mere ambition, although that played its part. Schacht simply could not believe that the die of destiny had been cast, that war and catastrophe were inevitable. Even while he plotted with others the occupation of government buildings and the immobilization of their personnel, a small voice within him suggested other possibilities. These people might still "need" him. They might still turn to common sense. They might stop short of war.

From the first days of the Third Reich, Schacht had been in close touch with the men leading Germany's new Reichswehr. He was familiar with the members of that myterious, and perhaps partially fictionalized agency, the German General Staff. The generals learned to respect the economist, to recognize his genuine, pre-Hitlerian enthusiasm for a revived German army. He watched benignly at the military maneuvers and listened attentively while bemused officers explained events to a man who had never worn the army uniform. When Schacht and Göring began to trade blows, the regular army chieftains tried to prevent the complete alienation of the economist.

Many of these high officers were, like Schacht, a little uncomfortable at current events, although, also like Schacht, it was some time before they could generate enough concern to be described as "oppositionists." The philosophy of the old Prussian military tradition was still there. Things ought to be done with decorum and by law. But they did sense that things were being done. The Röhm purge of 1934 had destroyed a major source of distrust—the National Socialist Storm Trooper organization, chastened and sobered by the carnage visited upon its leaders, ceased to be of concern to

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the military. The treatment of the Jews, Hitler's church policy, the elimination of opposition parties—these things did not seriously disturb the generals. They were nonpolitisch—aloof from politics. They had a job to do, to train and plan for the very real army which was replacing the paper armies of the earlier days. Germany was recovering her dignity in a world where self-respect demanded that a strong nation have a strong army.

The first real doubts of the generals derived from the very untoward pace with which Hitler set things into motion. The General Staff regarded the Rhineland occupation in 1936 a mad adventure. If resistance had been met, Germany's arms would have fallen far short of the mark. Hostile France could have thrown the new, still ill-equipped army into disaster. This did not, of course, occur. Hitler had gauged the temper of his opponents accurately, had sensed the divisions at home, the uncertainty and indecision. But the preparation of the Wehrmacht (this title had replaced that of Reichswehr in 1935) moved slowly, much more slowly than contemporaries knew. In the estimate of the generals and in actual point of material supplies available it was still short of real needs in 1939. Supreme Army Commander Werner von Fritsch and Minister of War Werner von Blomberg listened with horror at the conference in the Reichschancellery in November, 1937. Earnestly they sought to warn Hitler that the German army was not ready for war, especially against Czechoslovakia. They had a healthy respect for the bristling fortifications ringing the Czech border. They could not contemplate with assurance a war in which an army of only three years preparation should confront those of nations who had been hampered in the period since Versailles only by the niggardliness of their politicians.1

Of these proceedings of the élite Schacht and other lesser lights were, prior to the Nuremberg trial, entirely unin-

¹The literature on the conflict of the German army leaders and Hitler is most extensive. Perhaps best are the study of the German general staff by Walter Goerlitz, of the German army in politics by John W. Wheeler-Bennett, and Sword and Swastika by Telford Taylor. See appropriate bibliographical entries.

formed. But Schacht, like many others, sensed the rumblings of distrust on the part of the military leadership of Germany and was not, therefore, entirely surprised by the events which transpired early in 1938.

Late in January Schacht's friend, Gisevius, received an urgent message from the economist. The former Economics Minister, now just Reichsbank President and "Minister without Portfolio," had heard "a mad rumor." Would Gisevius check on the position of Minister of War von Blomberg? Gisevius was able to do so, because he had begun some time previously to organize centers to obtain information in respect to the shady deeds of the National Socialists. So far, his major function was collection of data; later he hoped to put this data to work. Eventually Gisevius discovered the details of the lurid and disgusting story involved. Von Blomberg. once a sycophantic follower of Hitler, had been maneuvered into a marriage with a known prostitute and von Fritsch, the Army Commander, had been framed on a charge of homosexuality. Gisevius was later able to gather proof that the marriage of von Blomberg had been approved and sponsored by Nazi bonzes who knew of the past history of the lady concerned. As for the case of von Fritsch, the severe and decorous career-general had been made to bear the responsibility for the defects of a retired captain of a similar name. The result of the charges brought against the two was that Blomberg was replaced by General Wilhelm Keitel, "who appeared to Hitler to have the qualities of a good lackey" and whose post was reduced in importance. Fritsch was followed by General von Brauchitsch.2

While rumor was seething and confusion all about, Schacht leapt into furious activity. But the results were discouraging. When he talked to Admiral Raeder, who was later to sit with him at the bar in Nuremberg, the naval officer agreed that

²The Fritsch crisis is dealt with by Hermann Foertsch, Schuld und Verhängnis. Die Fritsch-Krise im Frühjahr 1938 als Wendepunkt in der Geschichte der nationalsozialistischen Zeit. See also Gisevius, To the Bitter End, 233 et seq.; Milton Shulman, Defeat in the B est, 29-31; Telford Taylor, Sucord and Suastika, 337-43; Wheeler-Bennett, The Nemesis of Power, The German Army in Politics, 1918-1945, 363-32.

the situation was serious, but denied that he could do anything. As for General von Rundstedt, then in command of the Berlin sector, he received Schacht coldly and told him he would know what to do if and when he chose to act.³ Clearly civilian advice was unwelcome. Schacht was especially anxious to secure a judicial court martial for von Fritsch—the charges against this officer were simply out of question. Eventually the Reichsbank President even contacted Fritsch's successor, but without effect.⁴

In the end von Fritsch secured the judicial review which he-and Schacht-had desired, and the verdict of the court, including Göring, Brauchitsch, and Raeder, acquitted him of all charges. But there was 1.3 fanfare, no rejoicing at the triumph of justice over fraud. Instead, the German public and the German military were electrified by Hitler's resounding triumph in accomplishing a goal that had been discussed and hoped for in Germany for twenty years. Austria, left a little German State when shorn of the non-German portions of its territory and inhabitants in 1918, had become a part of the German Reich. Military leaders who had feared the consequences of Hitler's rash policies of browbeating the Austrian government and intimidating others saw the goal accomplished with the pageantry of a parade ground. Von Fritsch, forgotten, dropped into the shadows and later poured out his blood in the death he sought on the battlefields of Poland. And Hjalmar Schacht, who had taken up the torch for him, tossed it aside on his way to Vienna.

The Anschluss of March, 1938 did not come, of course, as a complete surprise. Evidence of German pressure on the Austrian government of Kurt von Schuschnigg had been available for some months. Not until the last moments, however, did Germans realize that Austria was to "come home" without a fight between in-laws. Just before the event Schuschnigg in his farewell speech as chancellor indicated that the Austrian armies would make no resistance. When a member of the German army's finance department called

³Gisevius, To the Bitter End, 238. ⁴Ibid., 250; IMT, XII, 196-219.

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Schacht on the day of the march into Austria, the Reichsbank President not only informed him of the rate of exchange between mark and schilling but added the comment that in a "peaceful invasion" the soldiers must carry money. No requisitions must be made.⁵ He himself followed close after the soldiers to supervise the incorporation of the Austrian National Bank into the Reichsbank, to carry back to Germany four hundred million schillings in gold, and to make a speech.

Twenty years earlier Schacht and Theodor Heuss, both members of the newly created Democratic Party, had journeved to Austria to work by democratic and peaceful methods for Anschluss. Ungenerous opposition from abroad had thwarted their efforts.6 Now the thing was done. And Schacht in his speech to the employees of the Austrian National Bank rejoiced, "The road of the Nibelungen from the Rhine to the Ostmark has become free again." Critics who declared from abroad that "the method of effecting this union was terrible" had, said Schacht, only themselves to blame. Perhaps there might have been other ways of accomplishing this, but no one had done it. "It was only done by our Adolf Hitler . . . , " roared Schacht with emphasis and amidst long continued applause. The President of the German Reichsbank informed the employees of the Austrian National Bank that they were now his employees. He would, he said, protect his employees from insult, but the Reichsbank itself "will always be nothing but National Socialist, or I shall cease to be its manager." And the tall, gaunt, prim man with the pince nez, who had just visited generals and admirals in alarm at events transpiring at home, administered to his new employees an oath of personal allegiance to Hitler and led them in a triple "Sieg Heil" to the Führer!

What had happened to the banker? Had he suddenly forgotten all his fears in the rosy glow of diplomatic victory? Probably not. He later took pride in the fact that not one employee of the Austrian bank was fired. Perhaps his speech

Spruch. Proc., II, 386.

⁶Theodor Heuss. Friedrich Naumann: Der Mann. Das Werk, Die Zeit, 485. 7Conspiracy, VII, 394-402, Tr. of Doc. EC 297 A, March 21, 1938.

⁸⁷⁶ Jahre, 488.

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strengthened his position so that he might save his employees Perhaps he might be pardoned a little lapse into cynical glee at the way Hitler had stood Germany's enemies on their ears Perhaps he really felt the need, as he later declared, to cover the footsteps of his quests among the military by words of adulation directed to the man who in this hour had few critics at home.9 More probably, in spite of inward doubts, Schacht momentarily convinced himself that all might yet be well, that war might yet be avoided, that the economic future of Germany might still be secured. Not only was there an addition of four hundred million schillings in gold to Germany's narrow margin of exchange, but also Schacht was promised that the liquidation of the Mefo certificates would begin at the end of the current year. Schacht, who had assumed the post of Reichsbank President only on a conditional basis the previous year, now accepted appointment to a full four year term.10 But his optimism was not to last long.

After the war in the bitterness of his anger at those who sought to pillory him as a war criminal, Schacht lashed out repeatedly at the outside world. Who were these men who accused him of sycophancy and adulation for Hitler? Had not their diplomatic representatives formed an interminable parade to the feet of the Führer? Had not the Anschluss itself been met not with bullets but with the petitions of Sir John Simon, Anthony Eden, Lord Londonderry and Lord Halifax of Great Britain, of William Phillips of the United States, of Joseph Beck of Poland, of Milan Stoyadinovitch of Yugoslavia and many others? Did not these nations and their representatives realize that these many visits and the respects they paid to Hitler strengthened the position of the dictator and made more difficult the task of those who sought to contravene him?11 These troublous thoughts about Hitler's prestige were, indeed, strong in the mind of Hjalmar Schacht

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⁹Spruch. Proc., II, 387-9. Schacht claimed that he had furthered the meeting of Goerdeler with friends of his in London not long before this and that rumors of Goerdeler's activities had leaked back to Germany and almost caused his own arrest by the Gestapo, hence the strength of his speech. Abrechnung, 17.

¹⁰ Abrechnung, 16.

¹¹¹bid., 17.

in the summer of 1938. The new burst of enthusiasm for the regime had quickly waned, and a few months later Schacht was a confirmed member of that nebulous and ill-defined movement called the "German Resistance."

The Third Reich of Adolf Hitler was later described as the "S.S. State."12 It abounded in police and control forces of many varieties. The fear of punishment for deviation from prescribed thoughts and actions permeated the entire populace from the hierarchy at the top to the little people at the bottom. In some respects it was the activities of those at the bottom which was most terrifying. The nasty, mean-minded little spy who lived'in the same block typified the regime much more acutely to those who suffered under it than the shadowy dispensers of evil at the top. Most of these little offenders sat in an internment camp for a few months after the war and then returned home embittered but not seriously damaged by their experiences. But those who sought in that earlier period to oppose or even to criticize the regime found themselves confronted by a massive mechanism constantly moving to destroy dissent. Mass movements of discontent could not be expected in the face of ruthless repression. Opposition could never become revolution until it had first been conspiracy. Those who draw unpleasant comparisons between the broad membership of the French underground and the narrow group who constituted active participants in the German resistance ignore the full consolidation of authoritarian government in Germany in contrast to the mere beginnings of such a system in France. They also forget that the great bulk of the German youth was enrolled under the rigid discipline of the Wehrmacht. Then, too, it was always clear that the French underground were patriots, whereas members of the German resistance suffered from the suspicion of others and some internal doubts of their own as to whether they were patriots or traitors. From first to last, the German resistance movement was a small, ill-disciplined, scarcely organized effort to bring an alteration in the leadership of the government. Directed largely by men who found some

¹²Title of the well-known book by Eugen Kogon.

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security and influence from the vantage point of higher or lower posts in the regime they had come to oppose, the movement sought desperately a fulcrum of power. Force was essential. The praetorian guard of Heinrich Himmler must be immobilized. If a coup succeeded, the new regime must be stabilized until public understanding for the change had been won. Outside of the police, the unquestioning henchmen of the Third Reich, there was only one fulcrum of power—the army. That was the center of the resistance, the goal of the appeals of the resisters, its strength and its weaknesses forming the warp and woof of the destiny of the "Resistance." ¹³

The German resistance movement consisted of a considerable number of ill-coordinated "circles" about various personages. Often they were scarcely aware of one another's existence. Their aims and objectives varied, if and when they were defined. Schacht eventually made contact with several of these groups and was known to a number of their members. There were, however, large numbers of others who had never heard of his being connected with resistance activities. These were often horrified at the idea of this, in their eyes, self-sanctified and hypocritical assistant to Hitler becoming a convert to revolution. They shied away from him during the wartime period and wrote vehement letters of denunciation to the denazification boards after the war. Much of their animosity carried over into the foreign appraisals of the resistance movement after the war.14 But regardless of the hostility of some sections of the resistance groups Hialmar Schacht was from 1938 on an active and earnest agent in the effort to secure the downfall of the government of Adolf Hitler-that is, unless that government should suddenly see the error of its ways and recall him to a position of authority and influence.

From the first Schacht looked on conspiracy as a matter requiring discretion. One didn't advertise in the newspapers

¹³The literature of the resistance includes, in addition to the works mentioned in note 1, the volumes by Allen Welsh Dulles, Germany's Underground; Rudolf Pechel, Deutscher Widerstand; Hans Rotnfels, The German Opposition to Hitler: an Appraisal; Franz Reuter, Der 20. Juli und seine Vorgeschichte and numerous more specialized accounts.
14Spruch. Proc., II, 635-7.

that one was seeking to overthrow the government. He felt that too many of his associates tended to babble about new governments, cabinet posts, the disposition of Hitler, etc., long before initial success had been obtained. Like Lenin in 1917, Schacht warned that the success of a conspiracy depended upon its being fomented by a narrow group of "hardcore" revolutionists, that the larger the group the more danger there was of discovery and failure. Often he held apart from those he suspected of carelessness. He was, he said later, "his own circle." ¹⁵

Among those whom Schacht feared most for his exuberance was Carl Friedrich Goerdeler, who became, in the long run, the best-known leader of the resistance movement. Goerdeler's constant scribbling down of the names of men to fill posts after a successful coup d'état impressed Schacht as highly dangerous. Some of the scraps of paper later did involve innocent persons. Goerdeler, on his part, ne er completely overcame his distrust of the man who had been his superior when he held the post of Price Commissioner. In his "Political Testament" written in 1937 Goerdeler paid tribute to Schacht as "a man of the greatest ability" but noted that the economist's great ambition had been "the deciding motivation" in his service to Hitler. 16

Among other leaders of the resistance Schacht was also in contact with Johannes Popitz, who was Prussian Finance Minister, and Ulrich von Hassell, ambassador in Rome until 1938, after which he had a post in the Reich Ministry for Radio. Of these two the dairy of von Hassell, who knew Schacht much better than did Popitz, contained numerous critical references. During the war years Schacht broadened the circle of his acquaintances among the resistance leaders but often failed to win their complete confidence.

In 1938, however, Schacht was the major figure in the civilian sector working for positive action to unseat Hitler from his position of power. Hitler's diatribes on the plight of the German Sudetenlanders stranded in the midst of a

¹⁵ Abrechnung, 17.

¹⁶ Ibid., Friedrich Krause, hrsgbr., Goerdelers Politisches Testament, 23-4.

hostile Czechoslovakia failed to stir the economist. The grin visage of hostilities was outlined in stark hues and Schach looked aghast upon the prospect of Germany's undertaking a full scale war. The fatherland was prepared for war neither in the economic nor in the military sector. At the dinner party of one of his friends during the summer of 1938 the banker revealed the depth of his disillusionment as he almost shouted at his hostess, "My dear lady, we have fallen into the hand of criminals—how could I ever have suspected that?" Indeed how could he have suspected it—he who had been so confident that he could "steer" the regime into the safer waters of colonialism? But much of Schacht's concern was not occasioned by the browbeating of a smaller nation. He considered criminal the intention of the regime to launch Germany into a full-scale war which could not help but be disastrous.

Similar fears were entertained at this time by Colone General Ludwig Beck, Chief of Staff of the German army Beck was a very unusual personality, one of the few German generals with a deep sense of political responsibility. H was, of course, principally concerned about the recklessnes of German's foreign policy. "Hitler will be Germany's undo ing," he informed the American Military Attaché in Berlin "He far overestimates our military power. Sooner or late there will be a catastrophe."18 By July, 1938, Beck's fear had reached the crisis point. He drew up and circulated amon the members of the General Staff a highly critical memoran dum. Ultimate defeat in the West confronted the Germa army if the controversy over Czechoslovakia resulted in worl war, and Beck was sure it would. Beck's memorandum brough a tremor of fear to the German military. Even Brauchitsch the Commander of the Army, himself far from a dynamic per sonality, added a warning of his own as he passed Beck's mem orandum on to Hitler. But there was no response from the did tator. Beck's fears continued. Early in September he took th only other path of protest available and resigned his positio as Chief of Staff.19

¹⁷IMT, XLI, Affidavit of Schniewind, Mar. 18, 1946, Doc. Scht. 34, 267. ¹⁸Dulles, Germany's Underground, 39-40.

¹⁹Ibid., 41-2; cf. Gisevius, To the Bitter End, 279; Goerlitz, General Staj 327-31.

Beck and Schacht were by this time well acquainted. The military men were always to have a higher respect for the economist than did many of his civilian collaborators. According to Gisevius, Beck requested Schacht to join him in the resignation of protest against the course of events. He, Gisevius, felt at the time that Schacht's resignation would have been quite as effective as that of Beck and that the resistance by Schacht's gesture would not be losing a position of as much influence as that which Beck held. Major General Hans Oster, Chief of Staff in the Intelligence Bureau, disagreed. Oster, who was closely associated with Schacht in the later period, believed Schacht's position as Reichsminister gave him an easier entrée to the circles of the military. As for Schacht himself, he later denied that resignation had ever been suggested. He also declared that Beck's resignation served no useful purpose. Seemingly he was right. News of the resignation of the Chief of the General Staff was withheld from the public and he was replaced by a man much less suited to the purposes of the "resisters."20

General Franz Halder, who succeeded Beck, was described aptly by Schacht as a man of rubber, full of courage when someone pumped him up, but limp when the air was let out. Much more to the liking of the economist and in his orinion firmer in character was General Erwin von Witzleben, the commander of the troops in the vicinity of Berlin. With the strong backing of Witzleben and the cautious, uncertain acquiescence of Halder and with the aid of Eric von Brockdorf-Rantzau, commanding officer of the Potsdam Division, Schacht worked during the late summer of 1938 for a carefully planned coup d'état to overthrow the regime and prevent the coming of war.

Beck, who still had great personal influence after his resignation, recommended that his successor listen to the propositions made by Schacht. When the conversations began, Halder wasn't sure he had acted wisely in seeing Schacht. He

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²⁰Gisevius, To the Bitter End, 280; IMT, XIII, 28-9.

²¹ Abrechnung, 37.

didn't know Gisevius, who accompanied Schacht, and he was quite taken aback by the very frank way in which the Reichsbank President launched out on a discussion of deposing Hitler. Nor was Halder convinced that his visitor or those they represented had sufficiently agreed upon any clear-cut plan for action after a coup. He also had some doubts that the military should take a hand in the situation. "The people who put Hitler into power," he told Schacht, rather pointedly. "should get rid of him. . . . You elected Hitler, you put him in power. We soldiers had no right to vote." With encouragement, however, Halder took a more definite stand. Assured of his surroundings, he was ready to denounce Hitler as "this madman," "this criminal," and to charge him with wilfully steering Germany into war, possibly because of his "sexually pathological constitution" which made him wish to see blood flow. Gisevius adds that Halder went on to confront Schacht with the direct offer of political leadership in a post-coup government. But Gisevius has been accused of some errors, among them a tendency to magnify the role in the resistance of Hjalmar Schacht. On the other hand, later events stressed the fact that the military were quite willing to assign Schacht a responsible position. The guess might be hazarded that the names of the civilians supposed to be prominent in 1938 were suggested by those who were not too friendly to the economist.22

Halder gave Schacht his consent to further consultations with Generals von Witzleben and Brockdorf-Rantzau. Schacht had become acquainted with Witzleben through the mediation of General Hans Oster, who had been sympathetic with the resistance group for some time.²³ Erwin von Witzleben was, by Schacht's appraisal, an upright officer, born and bred a nobleman, but more a corps-leader than general staff material. Witzleben hated the half-educated Hitler and regarded him an intruder in a sphere for which he lacked tradition and characteristic attitude. "The fellow has never

²²Ibid., 18; Dul'es, Germany's Underground, 43-4 (gives little significance to Schacht. Dulles seems to have conceived a very hostile attitude toward Schacht and undervalues his resistance efforts); Gisevius, 287-9.
26. Gisevius, 299, 304.

impressed me," he declared.²⁴ Little salesmanship was required on the part of Schacht to obtain Witzleben's ardent cooperation in projects of coup d'étal. When the first effort went astray, Schacht remained in close touch with him and continued to find sympathy for new opposition plans.²⁵

Contrary to the impression left by some postwar accounts, the plans for the projected stroke of state were worked out in the utmost detail. The group concerned plotted the position of the important buildings in Berlin, the necessary disposition of troops and tanks, and tentative arrangements in respect to key figures in the existing regime. Hitler would be declared insane and Himmler and Göring proclaimed the chief criminals. The arbitrary procedures of the Gestapo would be exhibited in documentary form to a populace still unaware of the depth of infamy which existed. Admiral Wilhelm Canaris, chief of the German counter-intelligence service, had collected the materials which were to be used for this purpose.²⁶

But there must be war. Without a declaration of war the coup d'état would be useless. How could the military explain to the German public the removal of the dictator if there were no war? With Austria in his vest pocket and the world marveling at the power of Germany, even serious critics of the government had their doubts about his removal. Schacht himself had temporarily wavered in his anti-Hitler feelings. The resisters, of course, expected war. They felt confident that the British and the French would not waver in their defense of the democratic state of Czechoslovakia. Schacht, on his part, as a supposed expert on Anglo-Saxon mentality, assured his colleagues of the firmness and determination of the British. It would, indeed, be helpful if the

²⁴Abrechnung, 18.
²⁵Ibid.; Schacht's story is corroborated by the testimony of Frau Elisabeth Struepck, the widow of one of the oppositionists executed in 1944, and of Reinhard Brink, an attorney attached to the staff of the Western Supreme Commander, thus having close contact with von Witzleben. Frau Struenck participated in the reconnaissance of Berlin to plan the projected coup.

Spruch. Proc., I. 263-4, 252-5.

²⁶Ibid.; Gisevius 290, 307-21; Dulles, Germany's Underground, 45. A brief account by Halder is given in NMT, X. 542-5.

²⁷Gisevius, 306.

British could be informed that there was a group in Germany ready to remove Hitler if he persisted in his insanity. The resisters could not notify Chamberlain of their intentions through the registered post. New and unorthodox procedures were adopted. The Secretary of State in the German Foreign Office, Baron Ernst von Weizsäcker, arranged for a secret meeting of Theodor Kordt, the Chargé d'Affaires in London, with Lord Halifax. In his conversations Kordt assured the British that if they stood fast the German army would not fight. This counsel was, however, passed by on the way to Munich, where "appeasers" Chamberlain and Daladier sacrificed democratic Czechoslovakia to ease the rapacity of the Nazis. The Munich Conference set the seal of disaster not only on the fate of Czechoslovakia but also upon the hopes of the resistance movement.

How should this projected coup d'état of 1938 be evaluated? There has been a tendency to pass it by for the more dramatic days of July 20, 1944, when a bomb was actually planted and other visible signs of revolt were present. One appraisal of the resistance movement calls it with derision, the "Halder Plot," using quotation marks.29 It was not, of course, a Halder plot. The General Staff chief played a relatively minor and negative role in the events concerned. It might almost be called a "Schacht plot." Schacht's role of action was clearly substantiated in his denazification hearings. It was carefully planned—perhaps there were no conplete lists of new cabinets and plans for the economic and political policies of post coup governments, but it is possible to find sympathy for Schacht's feeling that these were premature until the success of the coup was assured. Most serious in form of criticism was that it depended upon action external to Germany-upon the attitude of Great Britain and of France. Goerdeler later told an American friend that Chamberlain made war inevitable "by shying from a small risk." On the other hand, Hitler was not, as Goerdeler believed,

²⁸Rothfels, The German Opposition, 60-1; Wheeler-Bennet, Nemesis of Power, 418.

Taylor, Sword and Swastika, 218, 221.

bluffing. And, as Allen Welsh Dulles, later director of the American Central Intelligence Agency, points out, it was difficult for British statesmen to rely upon the representation of groups whose size and influence they were unable to assess. If the plans for revolt had failed, the British would then have been confronted with the war they hoped to avoid.³⁰ However, in the judgment passed upon British appeasement policy, to an over-valuation of German military potential and under-valuation of Czech ability to resist aggression there must also be added an under-valuation of the strength of the German resistance group³¹ The fatality of the Munich agreement is thereby again underscored.

It must not be imagined, however, that Schacht was battling for the rights of Czechoslovakia. Even at Nuremberg he declared it "regrettable that in that state, which had five and a half million Czechs, two and a half million Slovaks and about three and a half million Germans, the German element had no means of expression." This statement was not, of course, a just appraisal of the Czech state on the eve of Munich. Schacht would not have used the violent methods employed by Hitler. His personal solution to the Czech question would have been a federated state, "similar perhaps to Switzerland divided into three different, culturally separate, but politically unified areas, which would be a guarantee for the unity of a German-Czech-Slovak state." He admitted. however, that in spite of his disapproval of Hitler's methods. he could not find serious fault with the consequences when the allies yielded.32 As a matter of fact, some months prior to the Munich Conference Schacht in a conversation with the French ambassador, François-Poncet, strongly supported a solution of the Sudeten question by a plebiscite procedure which would result in the cession of the predominantly German territories to the Reich.33 After Hitler's stroke, Schacht arranged for currency conversion and the incorporation of

³⁰Dulles, Germany's Underground, 47-2; Wheeler-Bennett is quite skeptical as to the degree of responsibility to be laid to British appearement for the failure of this plot. See Nemesis of Power, 4214.

³¹See Page 144. 32IMT, XII, 435; XIII, 20.

³³Bonnet, Defense de la Paix, 161.

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the local Czech banks of issue into the Reichsbank. Although the latter task could have been avoided only by resignation from the Reichsbank, it is quite clear that Schacht as a resister was only concerned about the security of Germany, not about international morality.

The acquisition of the Sudetenland by Germany did not quiet Schacht's fears about the future of his country. He was black in his pessimism about Germany's economic situation. In conversations with Ulrich von Hassell, who had recently returned from an ambassadorial post in Rome and become a close but critical associate of Schacht in his resistance efforts. Schacht declared Germany had pumped herself dry. Her foreign exchange reserves, including those obtained from Austria, had been used up in haste and waste.33 In November, 1938, the Reichsbank President made the speech entitled the "Miracle of Finance" referred to in a previous chapter. Before the Economic Council of the German Academy in Berlin Schacht marshaled in formidable array the various services which he and the Reichsbank had performed for the salvation of the German economy and the effectuation of the rearmament program. Beneath the optimistic notes ran a deep strain of concern. The scarcity of foreign exchange was repeatedly mentioned. He also obliquely suggested that Germany could lay down her "fighting methods" when other nations were willing to treat her fairly.36

There was much to justify Schacht's concern. The Reichsbank halted the issuance of the Mefo credits at the end of March, but the Reich treasury gave no evidence of the ability to repay these obligations as Schacht anticipated. To the contrary, the Finance Minister reported to Hitler that the public debt had increased from twelve and a half billion Reichsmarks at the end of 1932 to thirty-five billion Reichsmarks by the end of June, 1939.³⁷ Difficulties were so severe in

³⁴IMT, XIII, 21-2.

²⁵Amhassador Ulrich von Hassell, The Von Hassell Diaries, 1938-1944..., 3, Sept. 6, 1938. Cited hereafter, Von Hassell.

^{**}Conspiracy, VII, 601, Doc. EC 611.

371bid., 474-8, Memorandum of Finance Minister Schwerin von Krosigk,
Sept. 1, 1938, Doc. EC 419. Krosigk also warned Hitler that war was not
desirable at this time.

respect to tax receipts that the Minister of Finance even requested a loan from the Reichsbank to pay normal state salaries in November. When Schacht refused this request, the government obtained the money through private banks. The Finance Minister also indicated to the Reichsbank that the government would not be able to begin redemption in cash of the Mefo Certificates during the following year, but would have to pay for them with other treasury bonds of the Reich. This was entirely contrary to Schacht's original plans for the employment of these unorthodox financial expediencs. He and the Reichsbank directorate were appalled at the news.³³

Nor was Germany's economic situation likely to be improved by the renewed anti-Semitic program launched by the government in November, 1938. Schacht had from the first indicated that pogroms against the Jews sabotaged effective economic policy. On this occasion, when a Nazi diplomat was murdered by a young Jew in Paris, Hitler and other National Socialists gave public signs of approval of the persecutions of the Jews in Germany which followed. Schacht publicly denounced the atrocities. Before the bureau boys of the Reichsbank on Christmas Day, 1938, he proclaimed that these events were such as to make every decent man and woman blush for shame. He expressed the hope that none of the employees of the Reichsbank had had a hand in such matters and warned them that if they had, their presence was no longer desired. One of the few public protests made at this time. Schacht's was for the first time divorced from the excuse that these things were bad for economic policy.30

Speeches of protest, however, were not likely to help the persecuted Jews of Germany. Two weeks before delivering his castigation of the pogroms Schacht had initiated a more practical attack upon the problem. With Hitler's blessing he carried to London a plan for Jewish emigration from Germany. Schacht's mission was furthered by the continuing respect for the German economist on the part of British banking circles. Through the good offices of Max Warburg of a Jewish

³⁸IMT, XII, 524-5; Spruch. Proc., I, 223, testimony of Dr. Otto Schniewind. 39IMT, XLI, 268; Gisevius, 334-5.

banking house and of Lord Berstedt, Jewish owner of the firm of Samuel and Samuel, Schacht was enabled to present his proposals to a group consisting of Lord Winterton, the British government's representative in the Intergovernmental Committee for Refugees, George Rublee, president of the International Refugee Committee, and Sir Frederick Leith-Ross, Chief Economic Adviser to the British government. Schacht's plan was rather complicated in form and far from being above criticism. He indicated that there remained a balance of approximately six billion Reichsmarks from the proceeds of property confiscated from Jews in Germany. Of this sum, the Reichsbank president proposed that one and a half billion Reichsmarks, which would be the normal realization after the deduction of the various special taxes assessed on such property, be set aside as a trust fund. Against this fund "international Jewry," as Schacht expressed it, should provide a loan to Germany which would make possible the emigration of Jews in Germany. An allowance of ten thousand gold marks was to be made for each emigrant, although the money did not go directly into his hands. Schacht indicated that there remained in Germany approximately six hundred thousand Jews. Since two hundred thousand of these were elderly, they would not be able to leave. Of the others about one hundred fifty thousand were wage earners. The plan should make it possible for fifty thousand of these to leave each year with their dependents joining them later.40

This was not a very charitable plan. Critics of Schacht would, however, do well to take counsel with themselves as to how they would have gone about selling Adolf Hitler on charity for the Jews! There was, however, an additional phase of the plan of which Schacht himself was not very proud. He omitted it from his post-war descriptions. In London he pointed out to members of the committee with which he conferred that Germany would not be able to repay the loan contemplated unless there were a relaxation of trading barriers against her. In other words, the fulfillment of the plan

⁴⁰Spruch. Proc., 14, 476; DGFP, Series D, IV, 351-2, No. 280, Dirksen's report, Dec. 16, 1938; DBFP, Third Series, III, Appendix VIII, 675-7, describes the conference.

also included the responsibility of the foreign powers to import sufficient German goods to enable Germany to earn the foreign exchange needed to repay the loan. Most cutting was the comment of an observer at Schacht's later denazification hearing that this plan proposed a credit for foreign exchange to be guaranteed by stolen assets. On the other hand, under conditions then existing, even such a one-sided plan presented some hope for the tortured Jews of Germany. In his later negotiations Schacht consented to efforts to improve many of the conditions attached to the plan.

During his stay in London Schacht also explored the possibilities for betterment of the German economic situation through a trade agreement with Great Britain. He found some quite favorable reactions. Not only was he able to talk directly to Prime Minister Chamberlain in this regard but also tentative agreement was made for a visit in return on the part of Oliver Stanley, President of the Board of Trade, and for broader conferences by the industrial leaders of the two countries. Before these plans bore fruit, however, Schacht had been removed from the helm of the Reichsbank.

The German ambassador to Great Britain, Herbert von Dirksen, was enthusiastic about the results of Schacht's visit." His superiors at home did not share his enthusiasm for the diplomacy of the amateur. The Foreign Office had not even known about the project until Schacht was already on his way. Officials there complained that Schacht's plan for Jewish emigration contained proposals toward which they themselves had already presented a negative attitude. The banker pointed to Hitler's approval and added that Göring had also consented to a discussion of the problem of Jewish emigration upon an economic rather than a political basis. In spite of continued unfriendliness to his activities by the

⁴¹ Ibid.; Spruch. Proc., II, 476.

⁴²Dr. Auerbach, Spruch. Proc., II, 479. Schacht admits this was "not an ideal plan" but declares it did have some possibility of saving the Jews from complete economic destruction. 76 J., 402-3.

⁴³DGFP, Series D, IV, 351-3, Nos. 220-1.

⁴¹bid.; See also Dirksen's Moskau, Tokio, London, Erinnerungen und Betrachtungen zu 20 Jahren deutscher Aussenpolitik, 1919-1939, 237-8.

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Foreign Office, Schacht carried on with the mission January 16, 1939, he turned over to the Foreign Minist final notes on his conversations with Rublee, who had in behalf of the committee previously mentioned. 45 Son the distrust of the Foreign Office in respect to the wo the amateur seems justified, from their point of view. Sch allowed Rublee to raise a great number of points en rassing to Germany. Thus, Rublee suggested that the c tries receiving the emigrants be allowed to aid in selec them, that they might send representatives to aid in arrangements (and, probably, although not stated, to try investigate conditions), that priority be given to Jews in concentration camps (it was also suggested that the num of these might be supplied!), and that arrangements mig be made to give "decent conditions of existence" to the Je until they should emigrate. By the time Schacht conclud his mission, however, he was on the eve of a crisis at the Reichsbank. Thus his removal from this official post gav the diplomats an easy "out." A successor was appointed t conclude the negotiations and a less far-reaching plan fo emigration was adopted.46

Schacht's project to help the Jews was rather ambiguous. So was his state of mind. To Colonel Gronau, a resistance associate, he displayed a violent anti-Nazi memorandum of twenty pages, which he admitted he did not intend to send, but which provided what he called a "bowel movement of the soul."47 His confederates in the resistance were wary of him. He was, they declared, talking in one way and acting in another. Von Hassell felt that he was undergoing "some kind of inner conflict."43 Most probably Schacht was more worried

Germany's economy was in a crisis state. Of this Schacht was convinced and the Reichsbank directorate agreed. The

⁴⁵DGFP, Scries D, V, Nos. 654 (Dec. 12, 1938), 911; 655 (Dec. 20, 1938), 912-3; 658 (Dec. 23, 1938), 919; 659 (Jan. 4, 1939), 920; 660 (Jan. 13, 1939), 920; 661 (Jan. 16, 1939), 921,5

⁴⁶ Ibid., Nos. 662 (Jan. 18, 1939), 925; 663 (Jan. 21, 1939), 925-6. 17"Stuhlgang der Seele," Spruch. Proc., I, 348-9.

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government was confronted with three billion Reichsmarks in Mefo Certificates about to fall due for redemption. But there was no government balance to meet them. To the contrary the government was already a billion Reichsmarks in the red. The Minister of Finance made a second attempt in December, as he had in the month before, to promote a shortterm loan from the Reichsbank to pay salaries of government employees. The Reichsbank turned him down and advised him to report the government in a state of bankruptcy. The idea appalled the Finance Minister, Schwerin von Krosigk. He got the money from private banks for the second time.49

On January 2, 1939, Schacht had a conference with Hitler at the Berghof in Berchtesgaden. Painting the blackness of the economic situation, the troubled financial expert pointed to the fate of the last fine upon the Jews, assessed after the November shooting mentioned above. Even the Jews were out of hard cash. Nothing came in but stocks, bonds, and real estate. Hitler was not dismayed. He had "let the financial condition run through his head" and had come upon a solution. He did not deign to inform his Reichsbank President of the details of this solution, but indicated that banknotes could be put out against the things of value which had been collected. This was the worst that Schacht could have anticipated. He had already informed von Hassell that if the government began to solve its financial troubles by running the printing presses, he would "simply resign."50

The Reichsbank Directorate agreed with Schacht. Unanimously they agreed to the most drastic step available to them. On January 7 they dispatched to Hitler a scorching memorandum, bristling with underscored commentaries on the "danger point" of the currency and financial position, "the threatening danger of inflation," and "unrestricted public expenditures." Undoubtedly thinking of earlier efforts to solve problems with Nazi faith and energy, they warned. "There is no 'recipe' or system of financial or money technic [sic], regardless [of] how ingenious or well thought out it

⁴⁹IMT, XIII, 70, Testimony of Wilhelm Vocke, May 3, 1946. 50Abrechnung, 20; von Hassell, Sept. 6, 1938, 4.

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THE STRUCTURE OF THE NAZI ECONOMY

BY

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HARVARD STUDIES IN MONOPOLY AND COMPETITION

- 1. CORPORATE SIZE AND EARNING POWER
 William Leonard Crum
- 2. THE CONTROL OF COMPETITION IN CANADA 1.loyd G. Reynolds
 - UNFAIR COMPETITION
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HARVARD STUDIES IN MONOPOLY AND COMPETITION

238 THE STRUCTURE OF THE NAZI ECONOMY and thereby assisting the government's task of restricting consumption.

The short-run achievement of the Nazis is evident. The use of moral and material resources which in other countries are usually not mobilized before the start of hostilities has yielded impressive results as measured in an economy on a war footing. A German victory, moreover, may enable the standard of living to rise, since the exploitation of foreign workers and capitalists would enable German profits to rise at the same time that an increase in German wage rates took place.

The highly imperialistic character of the Nazi system arrives at completeness in its economic sphere. Individual Nazi party members are enabled to use the armed forces of the state for the aggrap lizement not only of the one-party state but of individual members of the party as well. The increase in wealth and income of Nazi party members is somewhat analogous to the loot and booty of feudal robber barons. The analogy breaks down because the feudal robbers did not have the weapon of the national state; Nazis have not only the state but likewise all the equipment and industrial organization developed since the Industrial Revolution.

The new industrialists of Germany are Nazi party members, and their competitors—other business interests at home and abroad—are at an extreme disadvantage. These non-Nazi business interests are similar in many respects to small businesses which were crushed or swallowed up by larger interests. What was once considered mammoth in business has been dwarfed by the possibilities open to individuals who may use not only armed forces but also the whole framework of government as represented by legislature, judiciary, and executive. Whereas earlier imperialist business interests were impeded and retarded by other elements in the society, the Nazis have set up a system whereby imperialist business interests may pursue

their objective practically unimpeded by pressure from other groups. The retention, in part, of a system of private ownership enables party members to build for themselves industrial empires; at the same time, restrictions upon private property, such as government determination of investment and regulation of prices and wages, make it possible for the economy to function as a war weapon without interference from rival industrialists or from consumers and workers. The owning class will exercises one function - the receiving and accumulating of profits. But industrial concentration and the increasingly pervasive influences of the bureaucracy have given a new aspect to the "capitalist" order. A new parasitic group - Nazi party members belonging for the most part to the old middle class per etrates more and more into the realm of property. Tyranny in the age of machines presages the continuation of an economic system which is basically decadent but efficient and aggressive in war.

MEMORANDUM DECISION AND ORDER OF KNAPP, D.J. ON DECEMBER 9, 1975 DENYING MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KUPT SCHALEDER,

Plaintiff.

- against -

MEMORANDUM AND CRDER

69 Civ. 1939

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer.

:

Defendant.

KNAPP, D.J.

It seems to me that the original Opinion answers the questions presented by the second motion for relief from judgment, and that any attempt to clarify would be futile. However, I shall state that it is my belief that res adjudicata would bar the new action which - as I gather - plaintiff proposes to commence. The original holding was to the effect that the vesting order had cut off all rights of every description which plaintiff had or could claim in the fund. Thereafter, since plaintiff had no claims of any kind against the fund, there was nothing of which any fraud by defendant could have deprived him.

The second motion for a new trial is accordingly denied.

SO ORDERED.

Dated: New York, New York

December 9, 1975.

WHITMAN KNAPP, U.S.D.J.

NOTICE OF MOTION FOR REARGUMENT OF DENIED MOTION UNDER RULE 60(b)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff,

-against-

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,:

Defendant.

NOTICE OF MOTION FOR REARGUMENT OF DENIED MOTION
UNDER RULE 60 (b) (l) and (4)
OF THE FEDERAL RULES OF
CIVIL PROCEDURE.

Civil Action .
No. 69 Civ. 1939 (WK)

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the opinion and order of this Court dated December 9, 1975, draying plaintiff's motion dated December 1, 1975, docketed on December 3, 1975, for an order vacating the judgment entered herein on Getober 6, 1975, and granting other relief from said judgment on the ground that it has been affected by mistake of fact, inadvertence, surprise, or excusable neglect, pursuant to a hidden dissent between the Court and plaintiff's attorneys in regard to plaintiff's claim to be adjudicated herein pursuant to Rule 60 (b) (l) of the Federal Rules of Civil Procedure, and on the ground that the said judgment is void by reason of a violation of due process in that the aforesaid misunderstanding as to plaintiff's claim to be adjudicated herein has irreparably prejudiced plaintiff's handling of the litigation herein and in that there is an ambiguity and uncertainty as to what claim or claims have been adjudicated herein purse ant to Rule 60 (b) (l) of the Federal Rules of Civil Procedure

and for such other and further relief as may be just and equitable, and upon the memorandum attached hereto, including the complaint contemplated by plaintiff to be brought as a new action, plaintiff will move this Court before the Honorable Whitman Knapp, United States District Judge, Southern District of New York, court-room 1505 at 2 p.m. on the 23rd day of January 1976, for reargument of plaintiff's aforementioned motion under Rule 60 (b) (1) and (4) of the Federal Rules of Civil Procedure pursuant to Rule 9 (m) of the General Rules of this Court, and upon such reargument for a granting of plaintiff's aforementioned motion, and for such other and further relief as may be just and equitable.

In the event that this Court shall lose jurisdiction over the instant motion by a transmission of the record on appeal to the Carcuit Court of Appeals, be it by way of a denial of plaintiff's motion dated December 15, 1975 (to be served upon defendant together with the instant motion), in this Court for an order extending the time to transmit the record on appeal or be it that such loss of jurisdiction occurs otherwise, then plaintiff respectively requests this Court to pass on the motion herein to the extent of resolving whether or not this Court will apply to the Circuit Court of Appeals for a return of the record.

Dated: New York, New York December 15, 1975

TO: Messrs. Turchin & Topper Attorneys for Defendar 60 East 42nd Street New York, N.Y. 10017

> Messrs. Martin, Obermaier & Morvillo Counsel to Defendant 1290 Avenue of the Americas New York, N.Y. 10019

Messrs. Berg & Deffy Counsel to Plaintiff 3000 Marcus Avenue Lake Success, N.Y. 11040 Werner Galleski Attorney for Plaintiff 450 Park Avenue New York, N.Y 10022 Telephone 371 9040

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF FOREGOING MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against-

LOUIS H. HALL, JR., as Preliminary : Executor of the Estate of HELEN B.

DWYER, :

Defendant.

Civil Action No. 69 Civ. 1939 (WK)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR REARGUMENT OF HIS DENIED
MOTION UNDER RULE 60 (b) (l) and (4) OF THE
FEDERAL RULES OF CIVIL PROCEDURE

INTRODUCTION

This is a motion to reargue the denial by opinion and order dated December 9, 1975, of plaintiff's motion under Rule 60 (b)(1) and (4), respectively, of the Federal Rules of Civil Procedure for relief from the judgment herein entered October 6, 1975, among other grounds and principally because of an ambiguity therein which makes it impossible to determine what cause or causes of action were adjudicated thereby.

The court's opinion leading to the judgment dismissing the complaint, exclusively discussed a claim based upon a fraud embarked upon and consummated in 1938. Under previous motion decisions, the law of the case was determined to the effect that plaintiff's principal claim was for equitable fraud committed by way of a retention of the fund by defendant's decedent and defendant himself after the conscience of equity called for a return to plaintiff of the property which plaintiff had given to the said decedent in 1938.

On his primary motion herein, plaintiff argued that the judgment was and is void until and unless the subject-matter adjudicated thereby is identified by a revision of the judgment. Otherwise plaintiff would be compelled to prosecute a new action simultaneously with his appellate proceedings.

The Court's opinion denying the motion held that any clarification would be futile on the grounds that plaintiff's new action would be barred by <u>res adjudicata</u>, that all rights of any description which plaintiff could claim in the fund had been vested as enemy property, and that there was nothing of which any fraud by defendant could have deprived him.

Plaintiff's prayer for reargument relies on his intended new complaint, copy of which is attached hereto as Exhibit I.

The issue of violation of due process by reason of uncertain and ambiguous adjudication is pivotal to the mistakes of fact, inadvertence, surprise, or excusable neglect set forth in the primary moving affidavit,

pp. 2, 3 and in plaintiff's prior post-trial motions dated October 16 and November 10, 1975, as referred to therein. On the basis of such pivotal issue, plaintiff requests reargument of the whole primary motion.

Plaintiff filed a Notice of Appeal in this Court on December 12, 1975. He prays that this Court preserve jurisdiction over this motion by an extension of the time limit for transmission of the record on appeal to the Circuit Court of Appeals and to recover its jurisdiction if and when lost.

Plaintiff is about to file Civil Appeal Pre-Argument Statement on Form C, copy of which is enclosed hereto as Exhibit II.

ARGUMENT

Point I:

Without clarification of what cause or causes are adjudicated by the judgment, there can be no due process herein.

Plaintiff sees a lack of due process in the feature that it cannot be ascertained from the judgment whether it has, in dismissing the complaint, adjudicated

(a) equitable fraud and unjust enrichment, in addition to fraud and deceit,

or,

(b) fraud and deceit only.

In the event of (a), plaintiff would not consider any new complaint.

Due process of law would be preserved. The judgment would be clearly valid. As to error, plaintiff is protected by his recourse to the higher courts. But this presupposes a clarification to the effect that the alternative (a) has been adjudicated. Such clarification would safely dissipate all doubts which are raised by the conclusions of law that plaintiff's claim for fraud and whatever equitable interest he had in the gift property arose in 1938 (Opinion 14/5).

A dissipation of doubts is further imperative in view of the settled law as summarized by Scott on Trusts (Sec. 462.1 page 3417):

"A constructive trust may arise even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it."

It can therefore not be seen how the arousal of the conscience of equity in the late sixties with the then resulting remedy for a constructive trust could have been viewed as a claim which had arisen in 1938. The Circuit Court of Appeals for the Second Circuit decided in Stoehr v. Miller, CCA 2d, 1924, 293F 414, 426, 427, that, as long as the enemy alien did not exercise his election of the remedy of constructive trust, there was nothing to be vested. This precedent gains added authoritative weight (a majori) from the fact that in Stoehr, the wrongdoing had already occurred prior to vesting, while in the case of bar the conscience of

equity was aroused more than fifteen years later only. At the time of the Vesting Order, plaintiff did not even have a right of election as yet. A right to remedial relief by impression of a constructive trust could in no sense arise before the pertinent substantive claim, to be aided by the adjective relief, had arisen through the achievement of an unjust enrichment on the part of the defendant.

In the event of (b), plaintiff would not have been barred from prosecuting his causes other than for fraud and deceit (by res adjudicata)

to the extent that they do rest on a different set of operative facts. On the other hand, however, he could not protect his respective rights by an appeal because such rights were left unadjudicated. His remedy would rather be either a new Complaint or a motion to get his Complaint herein amended so as to include those unadjudicated causes.

Without clarification as aforestated, plaintiff is compelled to prosecute his appeal in addition to the new complaint so as to insure himself against the risk that the alternative (b) may be adjudicated on appeal. Plaintiff's age (87) and the time-sensitivity of the contemplated new action, prevent plaintiff from postponing the new action until the action at bar is ultimately disposed of.

Point II: Clarification is not futile.

Plaintiff appreciates that the Court apparently endeavored to

In effect, the Court pronounced the clarification issue moot and held that the contemplated new action would be barred by res adjudicata. Plaintiff respectfully disagrees and urges that this holding has no res adjudicata effect in itself. It also offers no protection because it has a necessarily tentative aspect. No draft of the new complaint was submitted with the primary motion papers herein.

Plaintiff is further disturbed by the Court's continued adherence (in his opinion of December 9) to the global term "fraud" although the cardinal terminological distinction giving rare to the uncertainty of the judgment herein stems from the necessity to dissociate "fraud and deceit" from "equitable fraud". Plaintiff's moving affidavit on page 2 pointed out that under the "law of the case" the complaint sounded along with other causes, in equitable fraud, and on pages 3 and 7 that moving affidavit substantiated the prejudice flowing from the use of the global term "fraud". Plaintiff fully realizes that the court's reference to an all-inclusive global "fraud" may have had the purpose of covering "claims of any kind". Still the clarification presently sought should, it is urged, extend to whether or not plaintiff's cause for equitable fraud arose prior to the vesting order so as to have been susceptible of a cut-off under the Vesting Order.

Any practical helpfulness which the Court's decision may furnish

(particularly under Rule 13 of the local Individual Assignment System Rules which may bring plaintiff's new action as a "telated case" before the same Judge again) is in plaintiff's view far outweighed by the probability of further appellate proceedings. This leaves an intolerable degree of insecurity.

The operative facts governing a claim for unjust enrichment are entirely different from, and in some respects even inconsistent with, and directly contrary to, the operative facts governing fraud and deceit. On the other hand, the dismissal of plaintiff's action for fraud and deceit is entirely in line with his claim for equitable fraud. Therefore, plaintiff fails to see, for the purposes of his equitable fraud action, legal grounds on which the opinion of December 9 holds that in order to have such claim he must have been deprived of property in regard to which he must have claims which were not cut off by Vesting Order. In this respect it should be noted that the term "equitable fraud" is in various regards an outright misnomer. It does not necessarily imply any deprivation as to property at any stage and can exclusively aim at unjust enrichment running counter to the conscience of equity. About this and the ambiguity and meaning of "fraud" as opposed to "equitable fraud", Bogert on Trusts, Sec. 471, states:

[&]quot;Fraud" is, of course, a very ambiguous word. It may mean misrepresentation which would give ground for an action of deceit. It may imply the acquisition of property by some other types of wrongdoing or by any class of inequitable conduct. Certainly it is not true that all

constructive trusts are based on "fraud", unless that word is used in its broadest sense, as including all conduct which equity treats as unfair, unconscionable, and unjust."

Accordingly, there remains uncertainty whether the Court in its opinion of December 9, may have referred to "fraud" in the sense of deceit only. Such interpretation could on the basis of the Court's potential concept of "equitable interest" conform to the said opinion's conclusion that after the vesting of whatever right he had in the fund, plaintiff could no longer be deprived of such right by any fraud.

Thereagainst, in plaintiff's submission his deprivation of his property as of the time of unconscionable retention or at some other time subsequent to the vesting, would not be a requisite operative factor for the adjudication of a wrongdoing culminating in unjust enrichment. This point is driven home by a further quote from Bogert, supra:

ful retention of property which have moved chancery to decree the constructive trust. No such list can be absolutely exhaustive. Wher ever equity finds such a wrongful holding, it will give relief, whether the type of injustice is new or old. The court does not restrict itself by naming all the specific forms of inequitable helding which will move it, but rather reserves complete liberty to apply this remedy to whatever knavery human ingenuity can invent."

The judgment herein, amalgamated with the opinion of December 9, does therefore, in plaintiff's respectful submission, not bar the intended

new complaint, nor raise any collateral estoppel against it, as long as the judgment is not revised to the effect that the adjudication of a cut-off pertains to his cause based upon an unconscionable retention and an unjust enrichment, both of which came to pass in the late sixties or later.

Accordingly, plaintiff's exposure to uncertainty, as set forth in the moving affidavit herein (p.7), stands unabated and can be overcome by nothing but a clarification as to what cause or causes of action were adjudicated by the judgment entered October 6, 1975. In the absence thereof, plaintiff respectfully urges that due process is violated and the judgment is void.

Conclusion.

By reason of the foregoing, it is respectfully submitted that reargument herein be granted and that, upon reargument, the primary motion herein should be granted.

Respectfully submitted.

Werner Galleski Attorney for Plaintiff 450 Park Avenue New York, N Y. 10022 Tel. 371 9040

EXHIBIT 1 - INTENDED NEW COMPLAINT ANNEXED TO FOREGOING MEMORANDUM

1006a

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against-

(INTENDED NEW)
COMPLAINT

LOUIS H. HALL, Jr., as Executor of the Estate of HELEN B. DWYER,

Defendant.

Plaintiff, by his attorney WERNER GALLESKI, for his complaint against the above named defendant, respectfully alleges upon information and belief except as to matter set forth in paragraphs 13), 28) and 30) which are alleged upon knowledge.

For a First Cause of Action (Federal Question Action):

1) This action arises under Federal Common Law upon which the Alien Enemy Act of 1798 (50 USCA Sec. 21) and the Trading with the Enemy Act of 1917 (50 USCA App. Sec. 1), have been built. It is predicated upon wrong-doing on the part of HELEN B. DWYER and the defendant, respectively, in that Dwyer has retained and the defendant still retains, certain property (originally owned by plaintiff) beyond the time when the conscience of equity called for the turn-over of such property to the plaintiff, and when the Federal Common Law. hostile to a windfall in favor of persons other than either the US Government or the original enemy owner, called for such turn-over.

EXIIIBIT T

Remedial relief is sought by means of an impression of a constructive trust upon property held by the defendant.

- 2) In or about 1928 plaintiff, a German national, received from the US Government a partial return of property which had been vested as enemy property in World War I.
- 3) In or about 1928 plaintiff issued a power of attorney whereunder LOUIS H. HALL Sr., attorney at law at the City of New York, was empowered to act as plaintiff's attorney-in-fact in regard to securities and cash deposited with New York Trust Company.
- 4) From then on Hall Sr. advised plaintiff in regard to the property, which remained invested in the United States.
- 5) Under the legal stewardship of Hall Sr., part of the said property was, in or about 1935, invested in a corporation organized by Hall Sr. for that purpose, with its stock and claims for repayment of cash advances nominally held by JENNY BOCHMANN, now deceased, who was plaintiff's sister-in-law and resided in Switzerland.
- 6) In or about 1937, Hall Sr. advised plaintiff that, for the purpose of protecting him from the consequences of his violation of German foreign exchange control and related laws, he should transfer the said stock and cash claims to a US donee to be appointed by Hall Sr., with the proviso that Hall Sr. would be able to act

in that transaction only if there were no strings attached so that the transfer was absolute, irrevocable and without imposition of any obligation upon the donee. Plaintiff accepted that advice and Hall Sr. selected as donee HELEN B. DWYER, who then was and had since about 1929 been his personal secretary.

- 7) On or about March 15, 1938, and pursuant to Hall Sr.'s advice, plaintiff transferred the said stock and claims to Dwyer.
- 8) Plaintiff had never met Dwyer nor did he know of her prior to the arrangement of the gift to her.
- 9) Plaintiff had unlimited confidence in the competence and integrity of Hall Sr. He believed it to be in his best interest to follow Hall Sr. 's advice.
- Plaintiff considered it as axiomatic that Dwyer (whatever her absolute rights, the irrevocability of the gift, and her freedom from any obligation would legally amount to, and however strongly and effectively he would be deprived of any type of legal or moral right in respect of the gift property) could not in good conscience hold on to his life savings after the emergency had passed.
- Plaintiff had an indefinite number of recourses alternative to the making of the gift. Except for his political loath and disgust, he was free to settle with the Nazir Or he could have looked for a number of available types of anonymous investments abroad.
- 12) Defendant is Hall Sr's son. About 1934 he became associated with Hall r's

law firm. He now is a senior partner thereof. He participated in the legal work for plaintiff or his nominee Bochmann from about 1935.

- As to the 1938 gift transaction and the matters of legality and morality as well as the windfall aspect there involved, defendant testified upon an examination before trial in the Matter of the Probate of the Will of Helen B. Dwyer New York County Surrogate's Court, File No. 4663/1970 Examination of Louis H. Hall Jr. on December 7, 1970, pp. 79-82, as follows:
 - Q Were you aware of the reason or reasons for the transfer from Jennie Bock man to Mrs. Dwyer?
 - A No. As I understand it, it was a gift from Jennie Bochman to Helen Dwyer.
 - Q Were there any documents given, or any latters making a statement to that?
 - A There must have been.
 - Q Do you know or don't you?
 - A I don't know. I cannot recall if there were any documents, but I think that there must have been. I was not in on the discussion of all of this. I was merely told that the transfer had been made, and to do the necessary to effectuate the corporation, get the shares issued and so on.
 - Q Where did Jennie Bochman reside?
 - A She was in Europe, Switzerland, and she is dead.
 - Q Do you know whether Mrs. Dwyer had ever known Mrs. Bochman?
 - A She did not know her.

- Q Did you learn of the reason for the gift by Mrs. Bochman to Mrs Dwyer of these assets?
- A I learned of it later. I didn't at the time. I was not in on the operation when the gift was made. I learned of it later.
- Q When did you learn of it?

MR. OWEN: Are you referring to the year? MR. DUFFY: As best as he can recall.

- A This was about 33 years ago.
- Q I am asking for your best recollection.

A Well, that's difficult. It was probably shortly after the transfer was made because I don't recall whother I was told at the time of the transfer. I was told to arrange for it, but now, I don't know.

- Q What was the reason that you were given for the transfer?
- A That it was a gift to her, that the person who was giving it had asked whether she could put her funds over here, she hoped that she would be able to have the funds held for her in her account and returned to her, and my father advised Mr. Graupner that there was absolutely no way that that could be done legally, and he also told Mr. Graupner, I was told, that the only thing that the person rould do would be to make an outright gift of it with no strings attached, and with no understanding, legally, morally, or otherwise, and the suggestion was that the person had to fulfull his legal responsibility, or would be in danger of imprisonment or worse.
- Q Did you arrange for this transfer, or was it your father?
- A That would be my father.
- Q So that the transfer of these shares, and the underlying assets were then carried out with the intention of being a gift, is that right?
- A That's my understanding.
- Q Do you recall being told how Mrs. Dwyer was selected to be the recipient?
- A Yes. I don't know if I can remember exactly what

it was, but basically the instructions came back from Mr. Graupner that Mrs. Bochman definitely wanted to dispose of this property completely and had no one herself to name, and wanted Mr. Graupner or my father, or someone to find a recipient.

The question in their minds was: Here is a windfall for someone. My father didn't want any part of it obviously being connected as an attorney in the matter. Mr. Graupner didn't want any part of it.

- Q He didn't?
- A No, he was a friend and client of my father's.
- Q Yes.
- A They wanted to give it to a complete stranger. A complete stranger could have been the person, provided that the stranger would accept it, and they thought of a deserving person who deserved the windfall, and luckily, or unluckily Mrs. Dwyer was elected as such a person and she accepted only on this condition on their advice.
- Q On the advice that it was a complete gift?
- A sa complete gift, because otherwise it would have been illegal, and immoral to receive it and hold it with any obligation whatsoever to return it.
- 14) During World War II the gift property in Dwyer's hands was blocked under the freezing regulations and later on vested under the Trading with the Enemy Act as property controlled by the plaintiff.
- Dwyer brought an action for return of the vested property to her on the ground that she was the sole beneficial owner thereof immediately prior to vesting. She entered upon a settlement out of court with the US Government and received certain cash and stock certificates.

- Plaintiff was a member of the Stahlhelm, a conservative paramilitary organization in support of such democratic and orderly principles of government as could approximately be germane to a liberal constitutional monarchy.
- 17) In or about 1934 the Stahlhelm was forcibly incorporated into the Storm Troopers, the foremost non-elite paramilitary organization in Nazi Germany.
- Dreading the thought of having to wear a brown shirt, plaintiff applied for and received his discharge from the nazified Stahlhelm and adhered to a group of former Stahlhelm members who either had been dispelled from the Stahlhelm by reason of their religion, race or political creed or left by their own volition like plaintiff.
- 19) By reason of the known feature of plaintiff's open and generally observable resistance to the Nazi regime he sustained substantial discrimination, restriction and damage in regard to his property and liberty.
- During World War II plaintiff was in contact with, and visited the apartment of Theodor Duesterberg, who was the projected Minister of War under the would-be Prime Minister Goerdeler whose revolutionary attempt to overthrow the Nazi Government failed in July 1944. Prior to nazification Duesterberg had been the Second Leader of the Stahlhelm. He was expelled because he had one racially Jewish grandmother.

- 7 -

- Upon cessation of hostilities in 1945, the underground minority sector of the Stahlhelm, to which plaintiff belonged, was reorganized as a post-war Stahlhelm under license of the Allied Military Government.
- After World War II until 1952 plaintiff was persecuted and variously imprisoned in the Soviet-Occupied-Zone for his anti-communist activities in the Soviet-Occupied-Zone in Germany.
- 23) HALL SR died in 1949. Dwyer thereafter continued as personal recreasy for defendant until 1953.
- 24) Plaintiff endeavored but was unable to find Dwyer until 1967.
- Dwyer died in May 1970. The elefendant was in or about 1972 appointed final executor of her estate, upon settlement of a probate contest (objections having been based upon undue influence) with statutory distributees, providing for substantial payments to such distributees. Principal beneficiaries under Dwyer's will are the defendant and his two sisters.
- 26) From shortly subsequent to the 1938 gift Dwyer, under the influence of Hall Sr. and the defendant, made testamentary dispositions and inter vivos dispositions predicated upon her death prinicipally and basically for the benefit of the defendant and his sisters. The domination of Dwyer by Hall Sr. and the defendant forced her to resist plaintiff's demands concerning the gift property

in 1967 and thereafter.

- 27) The retention of the gift property violates
- (a) the conscience of equity because plaintiff parted with his property in distress and under combined professional guidance of Hall Sr.,

 Dwyer and the defendant:
- (b) "the sound principle of common law today" pursuant to which, where ".... the public welfare demands—that this alien shall not receive....

 payment.... the government can make the decision without allowing a windfall..."

 (Ex Parte Kumazo Kawato, 1942, 317 US 69, 74, 75).

For a Second Cause of Action (Diversity Action)

- 28) Plaintiff is a citizen and resident of the Federal Republic of Germany.
- 29) Defendant is a citizen and resident of the State of Connecticut. Dwyer, his decedent, was at the time of her death a itizen and resident of the State of New York.
- The ,matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.
- 31) The allegations under paragraphs 2) through 27) herein are referred to with the same force and effect as if they were set forth herein at length.

- 32) Under the foregoing causes of action, both or in the alternative, plaintiff prays for impression of a constructive trust upon the assets of the defendant.
- 33) Plaintiff has no adequate remed at law.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

- (a) That a trust be impressed upon the assets held by the defendant;
- (b) That the defendant be enjoined and stayed from disposing of any part of said trust property until such time as a determination is had of plaintiff's rights and the amounts of plaintiff's interests are established, adjudged and paid;
- (c) That defendant be directed and compelled to account to the plaintiff for the gift property as well as for all income and profits accrued thereon;
- (d) That the defendant be decreed, adjudged and directed to pay and deliver over to the plaintiff the said property and all profits and proceeds directly or indirectly derived therefrom which may be found to be due to the plaintiff;
- (e) That the plaintiff has such other, further and different relief as to this court may seem just and proper in the premises, together with the costs and disbursements of this action.

Dated, December , 1975

Werner Galleski Attorney for Plaintiff 450 Park Avenue New York, N Y. 10022, Tel: 371 9040 MEMORANDUM DECISION & ORDER OF KNAPP, D#J+ SOUTHERN DISTRICT OF NEW YORK

1016a

KURT SCHMIEDER,

Plaintiff,

- against -

MEMORANDUM AND ORDER

LOUIS H. HALL, Jr., as Executor of

69 Civ. 1939

the Estate of HELEN B. DWYER,

Defendant.

KNAPP, D.J.

Plaintiff having filed his appeal to the Court of Appeals, I am without jurisdiction to entertain his current (third) motion to reargue. Moreover, it is my view that no purpose would be served by an application for remand, in that my previous opinions already make clear that plaintiff's proposed new complaint would be barred by the doctrine of res judicata. This is true for two reasons: (a) the first part of my opinion was that plaintiff had no standing in law or equity or otherwise to challenge defender possession of the property received by Mrs. Dwyer as a result o settlement of her suit against the government; and (p) the attend part held that, assuming such standing, plaintiff had not estable entitlement to the monies in question on the ground of fraudit (equitable or other), unjust enrichment or otherwise

of Appeals upholds either such holding, the Plaintiff is, in my view, forever foreclosed.

If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on that order and request the Court of Appeals to consolidate both appeals.

The motion for reargument is denied because this court is without jurisdiction. Accordingly, the companion motion for extension of time to transmit the record on appeal is also denied.

SO ORDERED.

Dated: New York, New York
December 18, 1975.

WHITMAN KNAPP, W.S.D.J.

ALD, New York this 10th . 10th 10th 10th 10th

WATIGHAL MITTER SHOULTON

ACTION NUMBER 2

COMPLAINT (Filed January 30, 1976)

UNITED STATES DISTRICT COURT SOUTHE, N DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff.

-against-

COMPLAINT

LOUIS H. HALL, Jr., as Executor of the Estate of HELEN B. DWYER,

Defendant.

Plaintiff, by his attorney WERNER GALLESKI, for his complaint against the above named defendant, respectfully alleges upon information and belief except as to matter set forth in paragraphs 13), 28) and 30) which are alleged upon knowledge.

For a First Cause of Action (Federal Question Action):

1) This action arises under Federal Common Law upon which the Alien Enemy Act of 1798 (50 USCA Sec. 21) and the Trading with the Enemy Act of 1917 (50 USCA App. Sec. 1), have been built. It is predicated upon wrong-doing on the part of HELEN B. DWYER and the defendant, respectively, in that Dwyer has retained and the defendant still retains, certain property (originally owned by plaintiff) beyond the time when the conscience of equity called for the turn-over of such property to the plaintiff, and when the Federal Common Law, hostile to a windfall in favor of persons other than either the US Government or the original enemy owner, called for such turn-over.

Remedial relief is sought by means of an impression of a constructive trust upon property held by the defendant.

- 2) In or about 1928 plaintiff, a German national, received from the US Government a partial return of property which had been vested as enemy property in World War I.
- 3) In or about 1928 plaintiff issued a power of attorney whereunder LOUIS H. HALL Sr., attorney at law at the City of New York, was empowered to act as plaintiff's attorney-in-fact in regard to securities and cash deposited with New York Trust Company.
- 4) From then on Hall Sr. advised plaintiff in regard to the property, which remained invested in the United States.
- 5) Under the legal stewardship of Hall Sr., part of the said property was, in or about 1935, invested in a corporation organized by Hall Sr. for that purpose, with its stock and claims for repayment of cash advances nominally held by JENNY BOCHMANN, now deceased, who was plaintiff's sister-in-law and resided in Switzerland.
- In or about 1937, Hall Sr. advised plaintiff that, for the purpose of protecting him from the consequences of his violation of German foreign exchange control and related laws, he should transfer the said stock and cash claims to a US donee to be appointed by Hall Sr., with the proviso that Hall Sr. would be able to act

in that transaction only if there were no strings attached so that the transfer was absolute, irrevocable and without imposition of any obligation upon the donee. Plaintiff accepted that advice and Hall Sr. selected as donee HELEN B. DWYER, who then was and had since about 1929 been his personal secretary.

- 7) On or about March 15, 1938, and pursuant to Hall Sr.'s advice, plaintiff transferred the said stock and claims to Dwyer.
- 8) Plaintiff had never met Dwyer nor did he know of her prior to the arrangement of the gift to her.
- 9) Plaintiff had unlimited confidence in the competence and integrity of Hall Sr. He believed it to be in his best interest to follow Hall Sr. 's advice.
- Plaintiff considered it as axiomatic that Dwyer (whatever her absolute rights, the irrevocability of the gift, and her freedom from any obligation would legally amount to, and however strongly and effectively he would be deprived of any type of legal or moral right in respect of the gift property) could not in good conscience hold on to his life savings after the emergency had passed.
- Plaintiff had an indefinite number of recourses alternative to the making of the gift. Except for his political loath and disgust, he was free to settle with the Nazis. Or he could have looked for a number of available types of anonymous investments abroad.
- 12) Defendant is Hall Sr's son. About 1934 he became associated with Hall Sr's

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law firm. He now is a senior partner thereof. He participated in the legal work for plaintiff or his nominee Bochmann from about 1935.

- As to the 1938 gift transaction and the matters of legality and morality as well as the windfall aspect there involved, defendant testified upon an examination before trial in the Matter of the Probate of the Will of Helen B. Dwyer New York County Surrogate's Court, File No. 4663/1970 Examination of Louis H. Hall Jr. on December 7, 1970, pp. 79-82, as follows:
 - Q Were you aware of the reason or reasons for the transfer from Jennie Bochman to Mrs. Dwyer?
 - A No. As I understand it, it was a gift from Jennie Bochman to Helen Dwyer.
 - Q Were there any documents given, or any letters making a statement to that?
 - A There must have been.
 - Q Do you know or don't you?
 - A I don't know. I cannot recall if there were any documents, but I think that there must have been. I was not in on the discussion of all of this. I was merely told that the transfer had been made, and to do the necessary to effectuate the corporation, get the shares issued and so on.
 - Q Where did Jennie Bochman reside?
 - A She was in Europe, Switzerland, and she is dead.
 - Q Do you know whether Mrs. Dwyer had ever known Mrs. Bochman?
 - A She did not know her.

Did you learn of the reason for the gift by Mrs. Bochman to Mrs Dwyer of these assets?

A I learned of it later. I didn't at the time. I was not in on the operation when the gift was made. I learned of it later.

Q When did you learn of it?

MR. OWEN: Are you referring to the year? MR. DUFFY: As best as he can recall.

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A This was about 33 years ago.

Q I am asking for your best recollection.

A Well, that's difficult. It was probably shortly after the transfer was made because I don't recall whether I was told at the time of the transfer. I was told to arrange for it, but now, I don't know.

Q What was the reason that you were given for the transfer?

A That it was a gift to her, that the person who was giving it had asked whether she could put her funds over here, she hoped that she would be able to have the funds held for her in her account and returned to her, and my father advised Mr. Graupner that there was absolutely no way that that could be done legally, and he also told Mr. Graupner, I was told, that the only thing that the person pould do would be to make an outright gift of it with no strings attached, and with no understanding, legally, morally, or otherwise, and the suggestion was that the person had to fulfull his legal responsibility, or would be in danger of imprisonment or worse.

Q Did you arrange for this transfer, or was it your father?

A That would be my father.

Q So that the transfer of these shares, and the underlying assets were then carried out with the intention of being a gift, is that right?

A That's my understanding.

Q Do you recall being told how Mrs. Dwyer was selected to be the recipient?

A Yes. I don't know if I can remember exactly what

it was, but basically the instructions came back from Mr. Graupner that Mrs. Bochman definitely wanted to dispose of this property completely and had no one herself to name, and wanted Mr. Graupnes or my father, or someone to find a recipient.

The question in their minds was: Here is a windfall for someone. My father didn't want any part of it obviously being connected as an attorney in the matter. Mr. Graupner didn't want any part of it.

- Q He didn't?
- A No, he was a friend and client of my father's.
- Q Yes.
- A They wanted to give it to a complete stranger. A complete stranger could have been the person, provided that the stranger would accept it, and they thought of a deserving person who deserved the windfall, and luckily, or unluckily Mrs. Dwyer was elected as such a person and she accepted only on this condition on their advice.
- Q On the advice that it was a complete gift?
- A As a complete gift, because otherwise it would have been illegal, and immoral to receive it and hold it with any obligation whatsoever to return it.
- 14) During World War II the gift property in Dwyer's hands was blocked under the freezing regulations and later on vested under the Trading with the Enemy Act as property controlled by the plaintiff.
- Dwyer brought an action for return of the vested property to her on the ground that she was the sole beneficial owner thereof immediately prior to vesting. She entered upon a settlement out of court with the US Government and received certain cash and stock certificates.

- Plaintiff was a member of the Stahlhelm, a conservative paramilitary organization in support of such democratic and orderly principles of government as could approximately be germane to a liberal constitutional monarchy.
- 17) In or about 1934 the Stahlhelm was forcibly incorporated into the Storm Troopers, the foremost non-elite paramilitary organization in Nazi Germany.
- Dreading the thought of having to wear a brown shirt, plaintiff applied for and received his discharge from the nazified Stahlhelm and adhered to a group of former Stahlhelm members who either had been dispelled from the Stahlhelm by reason of their religion, race or political creed or left by their own volition like plaintiff.
- 19) By reason of the known feature of plaintiff's open and generally observable resistance to the Nazi regime he sustained substantial discrimination, restriction and damage in regard to his property and liberty.
- During World War II plaintiff was in contact with, and visited the apartment of Theodor Duesterberg, who was the projected Minister of War under the would-be Prime Minister Goerdeler whose revolutionary attempt to overthrow the Nazi Government failed in July 1944. Prior to nazification Duesterberg had been the Second Leader of the Stahlhelm. He was expelled because he had one racially Jewish grandmother.

- Upon cessation of hostilities in 1945, the underground minority sector of the Stahlhelm, to which plaintiff belonged, was reorganized as a post-war Stahlhelm under license of the Allied Military Government.
- After World War II until 1952 plaintiff was persecuted and variously imprisoned in the Soviet-Occupied-Zone for his anti-communist activities in the Soviet-Occupied-Zone in Germany.
- 23) HALL SR died in 1949. Dwyer thereafter continued as personal secretary for defendant until 1953.
- 24) Plaintiff endeavored but was unable to find Dwyer until 1967.
- Dwyer died in May 1970. The elefendant was in or about 1972 appointed final executor of her estate, upon settlement of a probate contest (objections having been based upon undue influence) with statutory distributees, providing for substantial payments to such distributees. Principal beneficiaries under Dwyer's will are the defendant and his two sisters.
- 26) From shortly subsequent to the 1938 gift Dwyer, under the influence of Hall Sr. and the defendant, made testamentary dispositions and inter vivos dispositions predicated upon her death prinicipally and basically for the benefit of the defendant and his sisters. The domination of Dwyer by Hall Sr. and the defendant forced her to resist plaintiff's demands concerning the gift property

in 1967 and thereafter.

- . 27) The retention of the gift property violates
 - (a) the conscience of equity because plaintiff parted with his property in distress and under combined professional guidance of Hall Sr.,

 Dwyer and the defendant;
 - (b) "the sound principle of common law today" pursuant to which, where "... public welfare demands—that this alien shall not receive....

 paym nt....the government can make the decision without allowing a windfall...."

 (Ex Parte Kumazo Kawato, 1942, 317 US 69, 74, 75).

For a Second Cause of Action (Diversity Action)

- 28) Plaintiff is a citizen and resident of the Federal Republic of Germany.
- 29) Defendant is a citizen and resident of the State of Connecticut. Dwyer, his decedent, was at the time of her death a citizen and resident of the State of New York.
- 30) The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.
- 31) The allegations under paragraphs 2) through 27) herein are referred to with the same force and effect as if they were set forth herein at length.

Under both or either of the foregoing causes sof action, plaintiff claims monetary damages and unjust enrichment amounting to the value (in excess of \$700,000) of the gift property at the time as of which the Court shall find that the retention of the gift property by Dwyer and the defendant, respectively, must in equity be treated as unfair, unconscionable, and unjust, and in the alternative and to the extent that the Court shall find that such monetary damages and other compensatory payment shall not constitute an adequate remedy, for

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

impression of a constructive trust upon the assets held by the defendant.

- I. For \$700,000 to redress the wrong of retention of the gift
 property with interest from the date from which the retention shall
 be adjudicated to have been in violation of the conscience of equity.
- II. In the alternative (if the Court shall find the remedy under I to be inadequate):
 - (a) That a trust be impressed upon the assets held by the defendant;
 - (b) That the defendant be enjoined and stayed from disposing of any part of said trust property until such time as a determination is had of plaintiff's rights and the amounts of plaintiff's interests are established, adjudged and paid;

- (c) That defendant be directed and compelled to account to the plaintiff so as to (accountingwise) identify the gift property as of the time when its retention became wrongful, as well as for all income and profits thereafter accrued thereon.
- (d) That the defendant be decreed, adjudged and directed to pay and deliver over to the plaintiff the said property and all proceeds and proceeds directly or indirectly derived therefrom which may be found to be due to the plaintiff:
- III. That the plaintiff has the foregoing and such other, further and different relief ss to this Court may seem just and proper in the premises, together with the costs and disbursements of this action.

Dated, January 19, 1976

Watter Gall ski

Attorney for Plaintiff

450 Park Avenue

New York, N.Y. 10022

Telephone: 371 9040

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

76 Civ. 499

Plaintiff.

- against -

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of
JOHN S. MARTIN, JR., Esq., sworn to February 17, 1976, the record
on file in this Court, Index No. 69 Civ. 1939, and in the United
States Court of Appeals for the Second Circuit, No. 75-7696,
and the complaint herein, defendant will move this Court before
Hon. Whitman Knapp, United States District Judge for the Southern
District of New York, in Courtroom 905 at 2:00 p.m. on February 27, 1976, at the Courthouse, Foley Square, New York, New York,
for the following relief on the ground of res judicate based
upon this Court's judgment dismissing the prior identical complaint after trial:

- judgment dismissing this complaint pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) or, in the alternative
- (2) summary judgment dismissing this complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure, and
- (3) for such other and further relief as to the Court may seem proper.

Dated: New York, New York February 17, 1976

Yours, etc.

MARTIN, OBERMAIER & MORVILLO Attorney: for Defendant Office & P.O. Address 1290 Avenue of the Americas New York, New York 10019

TO: Werner Galleski, Esq. 450 Park Avenue New York, New York 10022

> Berg and Duffy 3000 Marcus Avenue Lake Success, New York 11040

AFFIDAVIT OF JOHN S. MARTIN JR. IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KUR! SCHMIEDER,

76 Civ. 499

Plaintiff.

- against -

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

AFFIDAVIT

,

STATE OF NEW YORK

88.:

COUNTY OF NEW YORK)

JOHN S. MARTIN, JR., being duly sworn, deposes and says:

- 1. I am one of the attorneys for defendant, and I make this affidavit in support of defendant's motion to dismiss the complaint herein pursuant to Pederal Rules of Civil Procedure, Rule 12(b)(6) and Rule 56.
- 2. The complaint in this action, hereinafter Action
 No. 2, is related to a prior case, 69 Civ. 1939, hereinafter
 Action No. 1, between the same parties and tried before this
 Court without a jury on June 30 and July 1, 1975. That trial resulted in a dismissal of the complaint both on the law and on
 the facts. Judgment dismissing the complaint was thereafter
 entered on October 6, 1975.

- 3. Plaintiff filed a notice of appeal from the judgment and a civil appeal scheduling order issued and appellant's brief and the joint appendix are due on March 26, 1976. A motion to dismiss the appeal on the ground the notice of appeal was not timely filed has been denied by the Second Circuit Court of Appeals.
- 4. Defendant's motion to dismiss under Rules 12(b)(6) and 56 is based on res judicata in that the parties in Actions Nos. 1 and 2 are identical, Mrs. Dwyer having died in 1970 and her Estate substituted as defendant, and the issues are identical. Copies of the complaints in Actions Nos. 1 and 2 are annexed hereto as Exhibits A and B, respectively.
- 5. In essence, the complaint in Action No. 1 alleges that plaintiff, a German national living in Germany in 1938, made an absolute gift of certain property to the late Mrs. Dwyer in New York upon the advice of her employer, a New York attorney, and there was a moral obligation on her part to return the property at some time in the future after the "emergency" passed. The complaint in Action No. 2 also alleges an absolute gift from the plaintiff to Mrs. Dwyer under the same circumstances and alleges that Mrs. Dwyer could "not in good conscience" keep the property after the same emergency has passed (Para. 10). Thus,

as is more fully developed in the accompanying brief, the issues are identical; whether plaintiff has any enforceable right to a return of this very same property which was the subject of his absolute gift to the late Mrs. Dwyer.

6. It is submitted that the issues raised by this complaint were already litigated in the prior action and, therefore, plaintiff is barred and estopped from asserting the allegations in this complaint, and this complaint should be dismissed.

JOHN S. MARTIN, JR.

Sworn to before me this

17th day 5 February, 1976

MARGARET C. HISLOP Notary Public, Store on Tow York No. 06-0014000 Qualified in Mona Charley Commission Expires March Co., 19769 EXHIBIT A - COMPLAINT IN ACTION #1 ANNEXED TO FOREGOING AFFIDAVIT

(Omitted here but printed at p. 7a)

EXHIBIT B - COMPLAINT IN ACTION # 2 ANNEXED TO FOREGOING AFFIDAVIT

(Omitted here but printed at p. 1018a)

MARTIN, OBERMAIER & MORVILLO
VENUE OF THE AMERICAS NEW YORK 10019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

76 Civ. 499

Plaintiff,

- against -

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

This memorandum is submitted in support of defendant's motion based upon the <u>res judicata</u> effect of this Court's judgment dismissing the prior action involving the identical parties and the identical issues. The motion seeks an order awarding judgment dismissing the complaint pursuant to Rule 12(b)(6) since it does not allege a claim upon which relief can be granted or, in the alternative, pursuant to Rule 56, since, as a matter of law, given the facts herein, summary judgment should be granted to defendant.

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In 1969 plaintiff commenced an action in this Court, Action No. 1, against the same defendant, the late Mrs. Helen B. Dwyer, who after her death in 1970, was replaced as defendant by her Estate. The complaint sought the return of property plaintiff, as a German national living in Germany, gave to Mrs. Dwyer by way of absolute gift in 1938 under the alleged advice of a New York attorney. Plaintiff alleged that the attorney gave his opinion that a moral obligation would exist for return of the property. The relief sought was a constructive trust, an accounting, and the delivery of the property. After a non-jury trial on June 30 and July 1, 1975, the Court held that plaintiff, as a matter of law, lacked standing to maintain the action because of the vesting of any interest he might have had in the property by the United States Government pursuant to the Trading With the Enemy Act and the subsequent settling of Mrs. Dwyer's action for return of the property, and also that as a matter of fact plaintiff had not shown he was entitled to the property either in law or equity, under a theory of fraud, unjust enrichment, or under any other theory. Judgment was entered on October 6, 1975 dismissing the complaint.

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A notice of appeal was filed and appellant's brief and a joint appendix are scheduled to be filed on March 26, 1976. There has been no modification in any way of this Court's October 6, 1975 judgment dismissing the complaint.

The complaint in this action, Action No. 2, is again brought against the Estate of Mrs. Dwyer by Mr. Schmieder.

The claim is virtually identical to the claim in Action No. 1.

Plaintiff asserts he gave Mrs. Dwyer an absolute gift in 1938, that she was morally obligated to return it to him in or about 1967 when he sought its return, and her retention of it at that time became unconscionable. The relief sought, a constructive trust, an accounting, and a return of the property plus all income and profits accruing over the years since 1938 is the same.

The only distinction in the two complaints, besides the superfluous language contained in the second complaint, is the deletion of the claim that any representation as to a moral obligation was made by the attorney and the insertion of the notion that plaintiff's interest in the property was created at the time he demanded it and she, in 1967, through her then attorney, refused to return it. This distinction is without

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significance since the operative facts are the same and this is simply an attempt to split the one cause of action. Given the identity of issues and parties the doctrine of res judicata is an absolute bar to this action. See, for example, Mendez v. Bowie, 118 F.2d 435 (1st Cir. 1941), cert. denied, 314 U.S. 639 (1941), where the Court at page 440 stated:

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"As for res judicata, the general rule applicable to successive suits between the same parties has long been formulated. The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented. This latter is to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits." (Emphasis added.)

The claims previously tried before the Court and those asserted in this complaint are identical. The claimed right to the property is the same. The wrong alleged, the retention of the property, is the same. The operative facts are the same:

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the absolute gift, the alleged advice, the vesting and the failure to return. Plaintiff's attempt in this complaint to change theories from an alleged fraud in 1938 to an unconscionable retention in 1967 does not change the identity of the cause of action.

In a similar case where the plaintiff, as in the instant case, attempted to continue an already prolonged, vexatious and harassing litigation, Judge Mansfield dismissed the second complaint which sought to add fraud and misrepresentation to the already dismissed claim of undue influence on the ground of res judicata. Walcott v. Hutchins, 280 F. Supp. 559 (S.D.N.Y. 1968), aff'd, 404 F.2d 937 (2d Cir. 1969) (per curiam). Squarely in point is the Court's statement at page 563:

"In the present case, plaintiff alleges that he has suffered the identical injury which he charged in the prior action. However, he is seeking to avoid the bar by pointing out that the means by which defendant inflicted the injury are different. Stripped of verbiage the substance of...[the] prior and present causes of action, however, is one and the same."

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See also to the same effect <u>Baltimore Steamship Co. v. Phillips</u>, 274 U.S. 316 (1926), where the Court stated at page 321:

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"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do: not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action."

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It is, therefore, submitted that res judicata bars

this claim, and this complaint should be dismissed.

Respectfully submitted,

TURCHIN & TOPPER

MARTIN, OBERMAIER & MORVILLO Attorneys for Defendant

AFFIRMATION OF WERNER GALLESKI IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff,

76 Civ. 499
PLAINTIFF'S AFFIRMATION
OPPOSING DEFENDANT'S
MOTION FOR SUMMARY

JUDGMENT

- against -

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

I am attorney of record for plaintiff and make this affirmation, being an attorney admitted to practice before the courts of record in the State of New York, subject to penalty of perjury:

1. Plaintiff opposes defendant's motion for summary judgment (designated as motion to dismiss the complaint herein pursuant to F.R.C.P., Rule 12 (b) (6) and Rule 56) on formal grounds as follows:

Defendant moves upon "the record on file in this court" in the prior action. In fact, however, out of more than 170 items entered on the docket, more than 120 have been lost.

Among the missing items is the "Order and Memorandum #43518", entered December 11, 1975, by which plaintiff's motion for relief from the judgment pursuant to F.R.C.P. 60 (b)(1) and (4) was denied. Plaintiff intends to rely on that item as a decisive part of the judgment - making process in the first action. Since res judicata cannot simply rest upon a comparison of complaints

I and 2, as attempted by plaintiff, but depends also on what has been litigated and adjudicated in Action No. 1, plaintiff is left without notice of a record indispensable to his defense against the within motion and to the support of his cross-motion for summary judgment in plaintiff's favor.

Defendant was alerted to plaintiff's need of a copy of the said Order and Memorandum 43518 through the last paragraph of a letter I directed to Staff Counsel in the Second Circuit Court of Appeal on February 10, 1976 (Exhibit I attached hereto). The letter of defendant's counsel as referred to therein, is also attached for full perspective (Exhibit II hereto). I reminded defendant's counsel about the copy on February 13, 1976, and he promised to send me the copy. None has been received. Plaintiff's defense is further impeded by defendant's failure to supply "a separate, short and concise statement" as required under Rule 9(g) of the General Rules of this Court. Such statement is particularly necessary because of this incongruency: the moving affidavit seems to invoke a purported issue preclusion while his memorandum submits argument tending to support claim preclusion.

Accordingly, plaintiff calls upon defendant to serve and file a copy of the Order and Memorandum #43518 as well as the said Statement and prays for ten days! time from such service to serve and file his opposing papers.

II. By way of a preliminary and tentative defense on substantive grounds, plaintiff offers the following:

Paragraph 2 of the moving affidavit states that the dismissal of Action No. I was "on the law and on the facts". In plaintiff's view, the accuracy of that statement is uncertain. A lack of standing under enemy property law principles means, under the restrictions Sec. 9 of the Trading with the Enemy Act, that a claim for return of vested property by an enemy national (if there was such a claim) must be dismissed for lack of judicial power. On the other hand, defendant's version may also be supportable under some language in the Opinion #43171 (pages 3, 9, 11, 12, 15) whereunder the lack of standing may mean that plaintiff is not the right party in interest, or that his claim has been released through the settlement between the Attorney General and Dwyer.

As to Paragraph 3 (concerning the status of the Appeal) plaintiff respectfully submits that the judgment involves a number of uncertainties which make it invalid and non-final, as noted in #4 of Exhibit I hereto.

Plaintiff's intended motion in the Second Circuit on validity and finality of the judgment is delayed by the non-availability of a copy of the beforementioned Order and Memorandum #43518, which is relevant to the interpretation of the adjudication.

Paragraph 4 of the Moving Affidavit does not identify the claims in Actions No. 1 and No. 2. It only alleges that "the issues are identical", which for itself points to issue preclusion.

Paragraph 5 purports to state the "essence" of the complaint in

Action No. 1. Still it fails to characterize its legal nature and does falsely contend that, according to the allegations in that complaint, there was some "moral obligation on her part (i.e., Dwyer's part) to return the property". On the complaint in Action No. 2, defendant sees identical issues as to "whether plaintiff has any enforceable right to a return" of the gift property.

Paragraph 6 clearly apports to raise a defense of issue preclusion to the end that "the issues raised by this complaint were already litigated in the prior a tion". Nowhere does the affidavit contend that those issues have been necessarily adjudicated, and if so how. Without at least some substantiation of such matters, the whole purported defense, resting upon a cursory comparison of two complaints, is totally inconclusive, and even more so in the face of #4 of Exhibit I where the presence of problems is indicated.

The introductory page of defendant's Memorandum still relies on issue preclusion, because of "identical parties and identical issues".

And on page 3, it reads: "The claim is virtually identical to the claim in Action No. 1." (Emphasis supplied) Although defendant thereby concedes that there cannot be any claim preclusion, which presupposes full and absolute (not only virtual) identity of claims, the Memorandum then goes on to quote from wholly inapplicable cases, dealing with claim preclusion and the splitting of one and the same cause of action, all applicable where

the claims in the two actions are really and truly identical.

The non-identity of the claims in Action No. 1 and No. 2 palpably follows from the distinction of the wrongdoings claimed in those actions.

Adjudicated in No. 1 has been a cause of action which accrued in 1938 upon acquisition of the property by Dwyer (Opinion p. 15 "whatever equitable interests Schmieder had in the property arose on the very day in 1938 when it was transferred to Mrs. Dwyer"). Action No. 2 is predicated upon an entirely distinct and separate wrongdoing, viz. upon the claim that her acquisition and retention of the property had been legally and morally unassailable until some time in or after 1967 and that, despite absence of pre-vesting rights of plaintiff, her retention of the property after such time became a wrongdoing because Mrs. Dwyer then - and not before - became unjustly enriched, see Scott on Trusts, Sec. 462. 2, p. 3417, and the authorities cited in his footnote 2:

"A constructive trust may arise, even though
the acquisition of the property was not wrongful. It arises
where the retention of the property would result in the unjust
enrichment of the person retaining it."

In addition to plaintiff's establishment of an independent claim of wrongdoing, this case also meets the other tests established by <u>Herendeen</u>
v. <u>Champion International Corp.</u>, Cir. 2, November 1975, 525 F2d 136:

a. Would a different judgment in Action No. 2 impair or destroy rights established in No. 1?

No, because an acquisition free from fraud does not insulate the acquirer from the possibility that the retention may become unconscionable at a later time. No. 2 does not aim for any disposition which would impair any valid adjudication in No. 1 to the effect that Dwyer's acquisition was free from fraud.

b. Is the same evidence necessary to maintain No. 2 as was required in No. 1?

Not at all. The operative facts relating to the fiduciary background of 1938 are either uncontested, or decided in plaintiff's favor.

The wrongdoing was triggered by additional facts as of the time when the conscience of equity was aroused.

c. Were the essential facts and issues of No. 2 present in No. 1?

No. Any valid adjudication in No. 1 covered the fate of pre-vesting rights of plaintiff only. No. 2 is predicated upon a post-vesting claim, and post vesting facts.

The foregoing excludes any possibility of claim preclusion. This leaves a theoretical possibility of issue preclusion still open. But defendant has not designated any issue (which he may claim to have been necessarily adjudicated in No. 1) for a defense of purported issue preclusion.

As soon as defendant shall have submitted a conclusive showing of the rationale of his defense, including a showing of some definite, valid, and final adjudication, all of which plaintiff cannot anticipate, a reservation is requested so as to enable plaintiff to raise the following matters by way of avoidance or affirmative defense:

- a. an excusable and reasonable doubt on plaintiff's part as to the meaning of what was decided in No. 1;
- b. lack of incentive to litigate and to focus on the No. 2 claim in No. 1
 whereby plaintiff was deprived of his day in court;
- c. change of law as to determination of res judicata in Memorandum and Order #43573 entered December 22, 1975, between judgment in No.1 and filing of complaint in No.2 inasmuch as District Judge MacMahon had decided Herendeen, supra prior to said judgment in a manner similar to defendant's present approach and was reversed in November, 1975;
- d. egregious error in No. I taken over from Attorney General predicating fraud perpetrated against plaintiff upon transfer of less than absolute

title to Dwyer rather than correctly, exercise of undue influence, leading in No. 1 to "crucial" treatment of a non-issue when both sides agreed on absolute title and the "gentlemen's agreement" was a matter of what was "intended" (Opinion p. 9 line 10) in conformity with the law of equity;

- e. an abrupt switch from the "law of the case" subsequent to the trial;
- f. priority of superior policies in the national interest.

Wherefore, plaintiff respectfully prays that defendant's motion be denied in all respects.

Dated, New York, New York, February 24, 1976

Werner-Galleski

Attorney for Plaintiff

PLAINTIFF'S PRELIMINARY & TENTATIVE STATEMENT UNDER RULE 9(g)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK		
KURT SCHMIEDER,	·-: :	76 Civ. 499
Plaintiff, - against - LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,	:	Plaintiff's Preliminary and Tentative Statement under Rule 9(g) of the General Rules of this Court, in Opposition to Defendant's Motion for Summary Judgment
Defendant.	:	

The motion is inconclusive, and not susceptible of formulation of any issues.

Absent a statement of the moving party (defendant), plaintiff cannot submit anything further at this time.

Dated, New York, New York, February 24, 1976

Werner Galleski Attorney for Plaintiff

THIRD AFFIRMATION OF WERNER GALLESKI IN OPPOSITION TO MOTION

:

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff.

76 Civ. 499

- against -

PLA INTIFF'S THIRD AFFIRMATION IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION.

LOUIS H. HALL, Jr., as Executor of the Estate of HELEN B. DWYER.

Defendant.

Werner Galleski, an attorney admitted to practice before the courts of record of the State of New York and attorney of record for the plaintiff herein, makes this affirmation in opposition to defendant's motion for summary judgment and in support of plaintiff's crossmotion for summary judgment, subject to penalties of perjury.

1. There is No Viable Direct Motion for Summary Judgment before the Court.

Plaintiff is required to fight against an unstated affirmative defense.

Its label of res judicata which is seemingly assumed to generate some unidentified magic power, is of no help. The motion fails to substantiate what res is involved, or how it became judicata.

Plaintiff does not contest defendant's right to waive the application of local rule 9(g) of the local General Rules to the extent that he would benefit therefrom. But plaintiff must, as far as plaintiff's benefit therefrom is concerned, insist upon at least substantial compliance with that rule.

Otherwise plaintiff is left in the dark and can at best rely on guessing.

For good measure, defendant even erects new and artificial hurdles which frustrate rational guessing. He argues that the judgment has not been modified "in any way" (defendant's memorandum page 3 lines 3 and 4).

But he also argues inconsistently (supra, page 2):

After a non-jury trial on June 30 and July 1, 1975, the Court held that plaintiff, as a matter of law, lacked standing to maintain the action because of the vesting of any interest he might have had in the property by the United States Government pursuant to the Trading with the Enemy Act and the subsequent settling of Mrs. Dwyer's action for return of the property, and also that as a matter of fact plaintiff had not shown he was entitled to the property either in law or equity, under a theory of fraud, unjust enrichment, or under any other theory."

This reading creates an impression as if such holding was part of the judgment. In fact, it was not. The judgment is bare of any reference to "unjust enrichment" or "any other theory". There however is a close resemblanse between the alleged holding and the Memorandum and Order entered December 22, 1975:

".....assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust enrichment or otherwise."

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The puzzle thus put to plaintiff is manyfold:

Is the judgment alleged to cover equitable fraud, unjust enrichment, and any other theory?

If so, is it alleged that

- (a) respective claims (which?) and/or
- (b) respective issues (which?)
 were fairly litigated?

If so, were all or some (which?) of such claims and/or issues fairly and necessarily determined? If so, was such determination necessary to Action No. 1?

Does defendant allege that anything in the said Memorandum and Order operates to modify:

- (a) the judgment and/or
- (b) the Memorandum and Order dated December 11, 1975;
 If so, to what effect?

What was the effect of Memorandum and Order dated December 11, 1975, before any effect was exercised thereupon by Memorandum and Order dated December 22, 1975?

The foregoing mysteries are no complete catalogue of the gaps in defendant's presentation. A number of further unsettling features are analyzed in plaintiff's papers in support of his motion in the Court of Appeals to determine nullity of the adjudication in Action No. I for uncertainty (Exhibit I hereto, the exhibits thereto not being attached because they are part of the record upon which the within motion is brought).

Wherefore, plaintiff respectfully prays that defendant's motion for summary judgment be denied in the absence of any viable presentation.

To cover the contingency that the Court shall deem defendant's presentation <u>prima facie</u> to be sufficient, plaintiff deals with the nebulous conclusions he may be able to draw as to defendant's case merely to protect the record.

2. Res Judicata is Flexible.

The anciently rigid doctrine of res judicata has been more and more relaxed during the last decades. A landmark expression in that direction stems from Washington, J. in Spilker v. Hankin, 188F 2d 35, 38-39 (D. C. Cir. 1951):

"Decisions . . . demonstrate that res judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies."

In Action No. 1, the "Suggestion" filed by the Attorney demonstrates the impact of the national interest upon the issues herein. The judgment and opinion in Action No. 1 seem to patterned along the expositions submitted by the Attorney General. Hereinbelow, it will respectfully be urged that those expositions are erroneous at law and pernicious as a matter of administrative policy, seriously hampering the effectiveness of the United States in conducting future economic warfare. This is the type of national interest which restricts the operation of res judicata at a maximum.

(a) Egregious Error

Upon oral argument herein on February 27, 1976, the relevance

under discussion. The Court signified it as "the crux of the case" that, in his present view, there is no legally valid basis for plaintiff's position that in 1938 an untainted absolute title was transferred from Schmieder to Dwyer, and that Dwyer did wrong in the late sixties only when she retained the property con trary to the conscience of equity. The colloquy centered on the "equitable disability" to which Dwyer, the donee was subjected through her essential participation in her employers' practice of law as an executive thereof. The Court opined that such "equitable disability" gave Schmieder an equitable interest in the property.

Plaintiff agrees with the Court to the extent that, if plaintiff had an equitable interest in the property at the time of vesting, such interest was vested by reason of the vesting of the property held by Dwyer.

But plaintiff points the thrust of his argument at the incompatibility of any pre-vesting interest with the assertion of claim for any type of fraud. Such action primarily aims for damages and, if an equitable interest were (through equitable disability of the donee) automatically reserved for the donor, there would be no damage. Nor would the donor be in need of any constructive trust since he can then directly enforce his equitable interest as a matter of the law of property. Consequently, an action for (legal or equitable)

fraud is premised upon the absence of a straight remedy under property.

law. This conforms to the complaint in Action No. 1 which, also in defendant's view (so moving affidavit page 2 line 15 and moving memorandum page 2 line 6) alleges an absolute gift. Plaintiff's story simply is this:

He trusted Hall Sr. who told him to make an absolute gift. So he did.

Particular aspects of Egregious Error which plaintiff feels not to have been sufficiently evaluated as yet, are these:

A. No Fraud Claim has been Vested.

The Court in Action No. 1 has not found that any fraud claim has been vested. The holding was that any equitable interest which plaintiff may have in the fund was vested and thereby cut off or extinguished.

The Vesting Order defined what was vested. It covered the listed items of property held by Dwyer. Pursuant to the principle of res vesting (as distinguished from global vesting on the basis of generalities) no type of fraud claim was vested. Nor did the Attorney General make any attempt to vest Schmieder's right to elect the remedy of constructive trust on the ground that there was no adequate remedy at law.

B. In any Event, the Right to Elect a Constructive Trust was not Suceptible of Being Vested.

The right to elect is a personal right, and not a property right subject to vesting. Even where purportedly vested, the government cannot control it and the person holding the elective right can effectively refuse to

exercise it. The leading case on this is Stochr v. Miller, 296 F 414, (CCA 2d, 1923):

".... property cannot be forced upon a cestui que trust against his will"..... also

" if their (the cestuis one trustents') renounciation had been made in order to a fat the seizure which the Alien Property Custodian had made"

Flowing from the Stochr rule, decisive is here the hostility factor:
the equity law restricting the power of fiduciary donees to get enriched
is not hostile, but friendly to the donor and his right of election. It tends
to protect him and not to ruin him. A compulsory exercise of the right of
election for the mere purpose of getting the property vested would not
have made any economic sense from Schmieder's viewpoint. This hostility
factor was brilliantly engaged by Surrogate Delehanty in favor of the
enemy widow of a U.S. decedent whose right of election against the will
of her husband was "vested":

The Attorney General of the United States as successor to the Alien Property Custodian is not constituted an attorneyin fact. He is the arm of the Executive, acting under the war powers of the Executive in the interest of the United States and in hostility to the interests of the enemies of the United States. He is in no sense a repesentative of a surviving spouse for the purpose of bringing into existence rights which are created solely in the interest of the spouse. The interests of the spouse are the objective of the grant of the right of election in the inheritance laws of the state. The grant is not a self-executing one. It is surrounded by limitations both as to amounts which may be claimed under varying conditions, as to the right to make claim at all and as to the time within which and the form in which the claim must be made, if at all. That the statutory program was enacted in the interest of the spouse solely is made clear

Spouses who have taken steps destructive of the marital bond are not entitled to elect. Spouses for whom an outright gift up to a particular money level has been provided and for whom also other benefits are provided up to the level stated in the act may not vary the will in any wise by election. The act operates to give the spouse the right to have a limited amount of cash where no outright provision is made for the spouse but no other attack on the will can be made if its terms otherwise meet the standard of the act. There is no automatic grant in any part of the text of the act. The act grants no property right in esse but only a property right in posse which springs into existence only if the statutory right is exercised under conditions which create the right only as of the time of the exercise of the election."

In re Herter's Estate, 83NYS2d 36,41 (New York County, 198) 193 Misc. 602

In Herter, the government was represented by John F. X. McGohey, U.S. Attorney. The decision was affirmed (84 S 2d 913, 274 AD 979) (300 NY 532).

The protective features drawn by the Surrogate from New York state law must under the law of equity protect a person who made a gift to an equitably disabled donee. Here, too, "the grant is not a self-executing on e". No constructive trust lies without full compliance with equitable demands upon the elector, which presently also include compliance with all laws concerning enemy relations, above all with federal common law.

C. Change of the Facts of the Case.

The Court's abrupt deviation from the Law of the Case as previously established upon motion proceedings by three District Judges will in the

light of A and B hereof become academic. No claim of plaintiff has been vested. No claim can have been cut off by vesting. No claim of plaintiff against Dwyer can have been settled through the Attorney General. Plaintiff therefore submits that, if the Court accepts A and B, the law of the case as decided upon by those three District Judges, stands reinstated.

It may also be noted that the settlement between Dwyer and the Attorney General concerned a title claim of Dwyer. The authorities used by the Court and defendant for "cut-off" would presuppose settlement of a creditor's claim, or a sale, or exchange, against consideration.

D. The Equitable Disability of Dwyer.

Dwyer's closeness to the gift transaction exceeds the degree shown in any of the cases found in regard to gifts from clients to employees of the primary fiduciary. All such cases rest upon the circumstance that the client's confidence into the employer's integrity colors off in favor of the employee. Not one case has been traced where the attorney-employer prescribed and arranged every detail of a transaction between his personal secretary and his client.

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This set-up entitled Dwyer, herself being a client, to receive any information she desired about the background of the transaction. Even if she had not worked on the Schmieder case and had not been in charge of respective records, her simultaneous status as employee and client gave "access" to all the background, which is decisive under Gardner v.

Ogden, 22 NY 327, 342 line 7, 350.

F. The Claim for Equitable Fraud.

The constructive trust by reason of equitable fraud shall be decreed retroactively from the time of the wrongdoing. So the pragmatic consensus of Bogert, <u>Trust and Trustees</u>. Sec. 472, with the proviso that the constructive trust arises when so decreed but with retroactive effect back to the wrongdoing, and <u>Scott on Trusts</u>, Sec. 462.4, with the proviso that the trust really arises at the time "when the duty to make restitution arises, not when that duty is subsequently enforced".

Under our Hostility Factor (see under B above) the ultimate ripening of the constructive trust occurred long after the vesting, also after 1951 when Schmieder escaped from the Russian Zone of Occupation of Germany to the Federal Republic of Germany. As long as he could not get information about Dwyer and the property, he was unable to develop a countervailing Security Factor in the face of his total abandonment by the defendant, Hall Sr.'s son and law partner. Thus, the wrongdoing occurred at the earliest in 1967.

The wrongdoing is unimpaired by, and unconnected with the vesting of Dwyer's property. An unjust enrichment of Dwyer does not presuppose a simultaneous damage on Schmieder's part. The conscience of equity

works within infinite limits and is aroused by the aggregate of all historical and present elements of the case as of the given time by virtue of otherwise resulting injustice.

G. The Influence of Acts of the Attorney General upon the Adjudication in Action No. 1.

In settling with Dwyer, the fundamental error of the Attorney General was his complete neglect of the law on undue influence. All respective facts were open on the table. Dwyer's equitable disability as to the gift, although not creating an equitable interest of Schmieder in the property, was enough to assume a risk of some enemy control in the economic sense, with future potential impact of the law of equity openly in the sidelines. Such risk was sufficient to substantiate an economically conceived degree of control which justified seizure of the property held by Dwyer, even though Schmieder had no equitable interest therein.

Schmieder's 1948 statement, certifying Dwyer's absolute and unconditional title had not the slightest bearing upon the real issue of control as a matter-of-fact in consequence of obvious undue influence.

In plaintiff's respectful submission, the following measures would have been in the Attorney General's line of duty In 1951: to resist Dwyer's title claim on the ground of unclean hands, and to induce criminal proceedings relating to false and fraudulent reports covering up the enemy source of the fund. Such measures would have been apt to assure the cleanliness of enemy property administration.

Further distortion of the law originated from the Attorney General's effort to defend the settlement into which he had entered with Dwyer contra legem. He intervened in Action No. 1 by a Suggestion asserting an interest in the action on the side of the defendant. The immense reputation of the Attorney General as source not only of power but also of highest-level jurisprudence must be presumed to have played some part in the errors committed by the Court in Action No. 1.

Even more dangerous is the Attorney General's pernicious policy of perpetuating past mistakes for the purpose of maintaining statistics of infallibility in the interest of future economic warfare. Such type of cover-up is shortsighted on general grounds. Presently, it also amounts to a travesty of integrity because it pictures the Attorney General as a tool in the hands of wrongdoers, whose fruits from wrongdoing he strives to poserve. At the same time such policy downgrades the quality of enemy property administration by disobedience to the laws of the United States, which include the superiority of the common law over statutory enactments, as signified by the Brief of the United States as amici curiage in Ex Parte Kawato, 1942.

(b) Plaintiff should be protected by reasonable doubt as to what was decided in Action No. 1.

Assuming that either claim preclusion or issue preclusion should have been effectively set up as an affirmative defense herein, it is respectfully prayed that plaintiff in any event was impeded "by reasonable doubt as to what was decided in the first action" under McNellis v. First Federal Sav. & L. Ass'n. of Rochester, N. Y. 364 F 2d 251 (1966 CCA 2d). In such circumstances "the drastic remedy of foreclosing

a party from litigating an essential issue" should not be applied.

The trial of Action No. 1 was to a large extent affected by the tentative opinion of the court in favor of an action for fraud and deceit. Thus the action for equitable fraud as pleaded in the complaint was, if at all, not realistically litigated.

Plaintiff's Cross-Motion.

The adjustments of fact and law, as set forth hereinabove, operate on the record invoked by the direct motion and entitle plaintiff to summary judgment in his favor.

The controlling matters, as to which no genuine issue of fact exists, are these:

- Plaintiff was the beneficial owner of the gift property immediately prior to the gift.
- 2. He transferred absolute title upon Dwyer,
- Plaintiff made the gift pursuant to advice of his attorney, Hall Sr.
- 4. Dwyer then was the personal secretary of Hall Sr.

- 5. The property held by Dwyer was vested.
- 6. Under a settlement with the Attorney General Dwyer received a partial return of the vested property.
- 7. Hall Jr. refused assistance to plaintiff and referred him to the absolute character of the gift.
- 8. In 1967 plaintiff located Dwyer.
- 9. Shortly thereafter Dwyer repudiated any duty toward plaintiff.
- Plaintiff's primary claim for damages is not an adequate remedy.
- 11. On that basis and for the purposes of the present motion, plaintiff elects remedial impression of a constructive trust upon the property held by the defendant.

WHEREFORE, plaintiff respectfully prays for summary judgment against the defendant impressing a constructive trust as aforesaid and directing defendant to account thereon.

Dated, New York, March 8, 1976

Werner Galeski

EXHIBIT 1 - NOTICE OF MOTION & AFFIDAVIT IN CIRCUIT COURT OF WERNER GALLESKI IN SUPPORT OF MOTION TO DETERMINE NULLITY OR NON-FINALITY OF ADJUDICATION BELOW ANNEXED TO FOREGOING

1065a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KURT SCHMIEDER,

Plaintiff-Appellant,

-against-

LOUIS H. HALL, Jr., as Preliminary Executor of the Estate of HELEN B. DWYER,

Defendant-Appellee

TWO APPEALS
Docket No. 75-7696
Docket No. 76-7038

NOTICE OF MOTION TO
DETERMINE NULLITY OR NONFINALITY OF ADJUDICATION
BELOW.

Please take notice that upon the annexed affidavit of WERNER GALLESKI, sworn to the 2nd day of March, 1976, the exhibits annexed thereto and on the record herein, plaintiff-appellant KURT SCHMIEDER, will move this Court in Room 1705 of the United States Courthouse, Foley Square, New York, New York, on the 16th day of March at 10:30 a.m. or as soon thereafter as counsel can be heard, for an order determining lack of appellate jurisdiction herein by reason of invalidity or non-finality of the adjudication made in the U.S. District Court for the Southern District of New York by the judgment entered October 6, 1975, the order entered on December 11, 1975, denying plaintiff-appellant's motion pursuant to Federal Rules of Civil Practice, Rule 60 (b) as well as the order entered December 22,1975, denying plaintiff-appellant's motion for reargument of the said motion, on the ground of an unresolvable ambiguity in respect of the claim or claims adjudicated and of other unresolvable uncertainties, or if the adjudication below shall be valid, on the ground that out of multiple claims presented, a part thereof was left

unadjudicated in violation of Federal Rules of Civil Procedure,
Rule 54 (b), and for such other and further relief as the Court shall deem
just and proper.

Dated: New York, New York

March 4, 1976.

Yours, etc.

Werner Galleski

Attorney for Plaintiff-Appellant

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TO:

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Counsel to Plaintiff-Appellant

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KURT SCHMIEDER,

Plaintiff-Appellant,

Docket No. 75-7696 Docket No. 76-7038

- against -

LOUIS H. HALL, Jr., as Preliminary Executor of the Estate of HELEN B. DWYER.

AFFIDAVIT IN SUPPORT OF
MOTION TO DETERMINE
NULLITY OR NON-FINALITY
OF ADJUDICATION BELOW

Defendant-Appellee :

STATE AND COUNTY OF NEW YORK, SS.:

WERNER GALLESKI, being duly sworn, deposes and says:

I am attorney of record for plaintiff-appellant and make this affidavit in support of his motion to vacate the adjudication below as invalid or to determine it to be non-final, by reason of numerous vital uncertainties.

(1) The documentary identity of the adjudication is uncertain.

The judgment herein (Exhibit A hereto) makes reference to the court's "opinion, constituting its findings of fact and conclusions of law" (Exhibit B hereto).

Plaintiff-appellant moved under F. R. C. P. Rule 60(b) for relief from the judgment, among other grounds by reason of its uncertainty as to claims adjudicated, by notice of motion and affidavit (Exhibits C-1 and C-2 hereto, without the attachments enclosed to Exhibit C-2 so as not to burden the present record with matters relevant to plaintiff-appellant's ethical rating and qualification

as resistance fighter in opposition to the Nazi regime but irrelevant to it the analytical construction and evaluation of the adjudication below).

That motion was denied by Memorandum and Order dated December 9 and entered December 11, 1975 (Exhibit D hereto), reading as follows:

"It seems to me that the original Opinion answers the questions presented by the second motion for relief from judgment, and that any attempt to clarify would be futile. However, I shall state that it is my belief that res adjudicata would bar the new action which - as I gather - plaintiff: proposes to commence. The original holding was to the effect that the vesting order had cut off all rights of every description which plaintiff had or could claim in the fund. Thereafter, since plaintiff had no claims of any kind against the fund, there was nothing of which any fraud by defendant could have deprived him.

The second motion for a new trial is accordingly denied."

Plaintiff-appellant thereupon moved for re-argument by notice of motion and memoramum (Exhibits E-1 and E-2 hereto) and argued by way of conclusion that the judgment is void for uncertainty unless it is clarified and "revised to the effect that the adjudication of a cut-off pertains to his cause based upon an unconscionable retention and an unjust enrichment, both of which came to pass in the late sixties or later" (page 10 of Exhibit E-2) (emphasis supplied). That motion was denied by Order dated December 18 and entered December 22, 1975 (Exhibit F hereto), reading as follows:

Plaintiff having filed his appeal to the Court of Appeals, I am without jurisdiction to entertain his current (third) motion to reargue. Moreover, it is my view that no purpose would be served by an application for remand, in that my previous opinions already make clear that plaintiff's proposed new complaint would be barred by the doctrine of res judicata. This is true for two reasons: (a) the first part of my opinion was that plaintiff had no standing in law or equity

or otherwise to challenge defendant's possession of the property received by Mrs. Dwyer as a result of the settlement of her suit against the government; and (b) the second part held that, assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust enrichment or otherwise. If the Court of Appeals upholds either such holding the plaintiff is, in my view, forever foreclosed.

If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on grounds of res judicata, and plaintiff can immediately appeal from that order and request the Court of Appeals to consolidate both appeals.

The motion for reargument is denied because this court is without jurisdiction. Accordingly, the companion motion for extension of time to transmit the record on appeal is also denied.

Although both of the aforequoted dispositions state a denial of the underlying motions, which negates any modification of the judgment, they also state the belief or view of the court in regard to some aspects of the judgment. But such statements do however not constitute any part of the judgment - making process unless they are recognized to modify the judgment by some amendment or supplementation.

No clue can be drawn from the reactions of defendant-appeller, who is straddling the issue of whether or not the judgment is in any was modified. He maintains on the one hand that the judgment has not been modified (so on page 3 lines 3 and 4 of his memorandum in support of his motion for summary judgment on the basis of res judicata in the new action 76 Civ. 499 in the U.S. District Court for the Southern District of New York between the same parties). On the other hand he adopts -

in slight paraphrase - changes which the District Court formulated in his .

Order entered December 22 even though it denied itself jurisdiction:

"... plaintiff had not established entitlement to the moneys in question on the ground of fraud (equitable or other), unjust enrichment or otherwise."

This practically coincides with defendant-appellee's version:

"the court held that plaintiff had not shown he was entitled to the property in either law or equity, under a theory of fraud, unjust enrichment, or under any other theory"

(p. 3 bottom of the mernorandum just referred to supra).

The foregoing throws an unresolvable doubt upon the identity of the authentic documents to be used in the interpretation of the judgment.

Even on the hypothesis that the judgment within its four corners was valid and final, such effect has, in plaintiff -appellant's vision, been destroyed by uncertainty as to whether or not the aforequoted two motion dispositions were part of the judgment-making process. Hereinbelow, the various uncertainties of the judgment will be treated on alternative bases depending on whether this Court of Appeals shall hold both, either or neither of those two dispositions to be effective in molding the judgment. At the same time, the resulting variations in the interpretation of the judgment will serve to demonstrate the impact and relevance of the uncertainty about the identity of the documentary elements making out the adjudication as a whole.

(2) The identity of the adjudicated claim or claims is uncertain.

With the four corners of the judgment and the opinion, the only type of claim discussed therein is for fraud and dezeit. On the last page of the opinion, it reads that "plaintiff has failed to satisfy his burden of proof" and the requisite proof would have been that "Mrs. Dwyer and Hall Sr. had in 1938 embarked upon and consummated a conspiracy to defraud." There is no indication as to whether or not the aspect of equitable fraud, be it pre-vesting or post-vesting claim, was also to be covered. The complaint (Exhibit G hereto), in plaintiff-appellant's submission, pleads equitab's fraud. Still, the judgment is ambiguous in leaving it open whether (a) equitable fraud is indirectly adjudicated to be d smissed, or (b) pre-vesting; and/or post vesting equitable fraud is before the court but is left hanging, thus making the judgment an interlocutory judgment, or (c) whether equitable fraud was adjudicated not to be before the court.

If Exhibit D, the Order entered December II, 1975, shall be held to possess a judgment-shaping function, it constitutes an adjudication that the ambiguities in question are not and cannot be resolved (because of futility). This in itself injects a most fundamental uncertainty into, and thereby causes nullity of, the judgment. The further reference to a res judicata effect of the present adjudication in a hypothetical future proceeding can, as plaintiff-appellant urges, only be evaluated as a pragmatic effort to help plaintiff-appellant to surmount the due process deficiencies complained of and can at most be a dictum. Such dictum is in any event inconclusive. It can only be construed to mean that the hypothetical future action should be subject to issue preclusion/res judicata

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(also sometimes called collateral estoppel) rather than claim preclusion/res judicata. The latter alternative applies where the claims in both actions are indentical. If the claims were identical, there would be no need for the court to allude figuratively to res judicata and to pronounce clarification to be futile. The court could rather have accomplished a simple clarification by an order granting the motion for relief from the judgment to the extent that, to create the requisite certainty and thereby to assure due process, the judgment was modified so as to adjudicate the equitable fraud claim, predicated upon an arousal of the conscience of equity in 1967 or later (but not earlier), to dismiss that claim. In the case of identity of claims such "clarification" was the indicated, purposeful and effective disposition. Accordingly, the said dictum can exclusively be understood to invoke issue preclusion, viz., that the same parties in a second action, though upon some other claim, are barred from attacking the justness of the adjudication of issues ecessarily determined in the first action. The court defines the issue so barred as the issue whether "the vesting order had cut off all rights of every description which plaintiff had or could claim in the fund. "

If the Exhibit F, the Order dated December 22, 1975, shall be held to play a role in the judgment-making process in spite of its tenor (denying re-argument of the motion for loss of jurisdiction through the filing of an appeal from the judgment), then the ambiguities as to what claim or claims

have been decided would at best stand partially and insufficiently resolved, namely just to the general extent that some equitable fraud would have been adjudicated. The most critical ambiguity, however, would continue to prevail as to whether, in addition to the 1938 claim focused upon by the opinion (Exhibit B, p.15 lines 3 to 5), a post-vesting claim predicated upon unconscionable retention of the property was also covered, or was left hanging, or was by implication determined to be outside the scope of the lawsuit.

The construction of Exhibit D as invoking issue preclusion is corroborated by Exhibit F, again subject to Exhibit F's being held to control the judgment. Exhibit F lists as issues in regard to which plaintiff-appellant is "forever foreclosed": (a) his lack of standing to challenge defendant-appellee's possession of the property and (b) his lack of entitlement to the monies in question. Such an enumeration of barred issues would be pointless if there were an identity of claims, where a claim preclusion would operate against the whole new claim as one unit.

Consequently, we are encounteringdeep-rooted uncertainties about the identity of the claims determined by each of the potential three components of the ultimate adjudication (Exhbits A. B. D and F.). And

such uncertainties are pyramided upon the uncertainty as to whether both, either or neither of the said two orders (Exhibits D and F) shall qualify as such components in the first place.

- (3) There is uncertainty as to
 - (a) whether the ruling that plaintiff-appellant'tloes not have standing to pursue this action" is an adjudication of lack of judicial power, and
 - (b) how (a) affects the condition that the adjudication of the "merits"is contingent upon the event" that "that ruling should be overturned"

(Both quotations from Exhibit B p. 15 lines 12 to 15)

(a) The differentiation of "standing" from the merits" in separate sections of the opinion speaks for a use of the term "standing" to signify the issue of access of the plaintiff to the court or, conversely, of judicial power to adjudicate. Under such definition, the issue of "standing" involves the court's jurisdiction of the subject matter. Still, there is no enambiguous holding that the court denied itself jurisdiction of the subject matter.

Thereagainst militates the holding (Exhibit B page 11/12) "that the very interest Schmieder asserts in this action is the one which was subject to the vesting order and ultimately disposed of in its settlement with Mrs. Dwyer "through the Attorney General. This and the repeated adjudication of a "cut-off" or extinction (Exhibit B pages 2/3, 9, 11, 15) of plaintiff-appellant's interest can just as well lead into areas requiring

the court's jurisdiction of the subject-matter butfor a limited use as to some "merits", such as for the issues whether Schmieder is the right party in interest and whether his claim has been discharged by the Attorney General's settlement with Mrs. Dwyer.

The ambiguity of the term "standing" shows up in the highest courts of this country, particularly in litigation under Article III of the Constitution, The U.S. Court of Appeals for the Eighth Circuit in Association of Data Processing Service Org. Co. v. Camp dismissed for lack of standing (1969, 406 F 2d 837). The Supreme Court reversed, with two Justices dissenting (397 US 150, 153, and note 1), on the ground that the "legal interest" test, which had been applied in the Eighth Circuit, "goes to the merits. The question of standing is different". The present judgment clearly adjudicates "legal interest" when it finds a cut-off of plaintiffappellant's interest and a prior settlement of the claim at bar. Frank t D. if it is held to be part of a judgment-modifying process, would appear hostile to a concept of lack of judicial power since it finds a substantive cutoff. Similarly, Exhibit F defines the lack of standing substantively as "no standing in law or equity or otherwise to challenge defendant's possession of the property". This evidences an obvious approach under substantive law rather an an approach under lack of judicial power.

The ambiguity resulting under (a) hereof leaves an imprint upon the qualification of the ruling on lack of standing whose overturn brings about the condition upon whose occurrence the alternative adjudication of the "merits" shall become effective. Depending on how the ambiguous conditions is resolved, , the effectiveness of the adjudication of the "merits" will arise (a) if and when judicial power over the action is determined, or (b) if and when Schmieder shall be found to be the right party in interest, or (c) if and when the settlement between the Attorney General and Mrs. Dwyer shall be determined not to have discharged Schmieder's claim. Each of those three conditions, which are applicable in the alternative, is subject to the further subordinated uncertainty as to whether the finding or holding through which the ruling on lack of standing (as concretized by one of those three conditions) shall be overturned, is required to be an ultimate adjudication upon exhaustion of all appeals, or whether any respective one time finding or holding shall trigger the effectiveness of the adjudication of the 'merits" .

Although the recent more relaxed practice may sanction the imposition of conditions upon the effectiveness of judgments where some worthy equitable purpose is served thereby, it is respectfully submitted that the aforedescribed uncertainties and variances, combined with further subordinated uncertainties, transgress by far all boundaries which are by the requirements of due process.

(4). No saving construction of the validity of the judgment can be seen without making it non-final.

The only rationally applicable saving of a validity of the judgment can be imagined on the basis of a strict reading of the judgment within its four corners, eliminating the dispositions upon subsequent motions by reason of their undeterminative character and by reason of their outspoken and clear denial of any modification of the judgment. Such construction will result in a valid judgment dismissing a 1938 claim for fraud and deceit, with a post-vesting claim for equitable fraud left undetermined in violation of F. R. C. P. Rule 54 (b). Such truncated judgment will be interlocutory and non-final.

Werner Galles ci

Sworn to before me this 4th day of March, 1976.

SOPHIE ECKHARDI Hotary Feblic, State of New York

No. 11 6143710 Qualif., 1 i. Caraca County County

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MEMORANDUM DECISION AND ORDER OF KNAPP, D.J. ON MARCH 12, 1976

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:

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

- against -

MEMORANDUM AND ORDER

LOUIS H. HALL, JR., as Executor of the Estate of HELEN.B. DWYER,

76 Civ. 499

Defendant.

#4/1/060

KNAPP, D.J.

Defendant moves to dismiss the complaint on grounds of res judicata, claiming that all issues tendered by the instant complaint have been decided adversely to plaintiff in a previous action between the same parties having the same caption and bearing Index No. 69 Civ. 1939.

The complaint in the 1969 action was dismissed after a bench trial. After plaintiff had appealed to the Court of Appeals, he made a motion for reargument before me. In denying that motion, I observed:

"Plaintiff having filed his appeal to the Court of Appeals, I am without jurisdiction to entertain his

current (third) motion to reargue. Moreover, it is my view that no purpose would be served by an application for remand, in that my previous opinions already make clear that plaintiff's proposed new complaint would be barred by the doctrine of res judicata. This is true for two reasons: (a) the first part of my opinion was that plaintiff had no standing in law or equity or otherwise to challenge defendant's possession of the property received by Mrs. Dwyer as a result of the settlement of her suit against the government; and (b) the second part held that, assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust enrichment or otherwise. If the Court of Appeals upholds either such holding the plaintiff is, in my view, forever foreclosed.

If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on grounds of res judicata, and plaintiff can immediately appeal from that order and request the Court of Appeals to consolidate both appeals."

The suggestions contained in the above question were followed by all concerned. Plaintiff filed his new complaint, the Clerk of the Court referred it to me as related to the previous action, and defendant moved to dismiss on grounds of res judicata. I follow my predicted course of action, and grant defendant's motion.

Plaintiff cites several authorities which, he claims, should deter me from this course: Ex Parte Kawato (1942) 317 U.S. 69;

McNellis v. First Federal Sav. & L. Ass'n of Rochester, N.Y. (2d Cir. 1966) 365 F.2d 251; Stoehr v. Miller (2d Cir. 1923) 296 F. 414;

Gardner v. Ogden (1860) 22 N.Y. 827; Re Herter's Estate (Sur. N.Y. Co., 1948) 193 Misc. 602, 83 N.Y.S.2d 36, aff'd 274 App. Div. 979, 84 N.Y.S.2d 913; Scott on Trusts (Third Ed. 1967) §462.4; Bogert, Trusts & Trustees (2d Ed. 1940) §472. None of them give any support to his position.

Ex parte Kawato holds that - at least on April 15, 1941 - the Trading with the Enemy Act did not apply to resident enemy aliens.

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No resident enemy alien is here involved.

In McNellis the Second Circuit held that a state court adjudication that a certain person had not been insolvent in April and June of 1962 did not foreclose - on grounds of res judicata - a finding of insolvency in August and September of that year.

Stoeher established that the alien property custodian acquired no title to an alien's alleged interest in a trust said to

have been declared by an American citizen where, as the Court found, the declaration of trust had never become effective.

Gardner has no discernible bearing on this litigation.

In <u>Herter</u>, the Surrogate held that - as a matter of New York law - the alien property custodian could not exercise a widow's right of election against her husband's will, especially where such exercise would take property from legatees who were American citizens.

Scott's treatise - to the extent that it is relevant supports my original view that whatever rights plaintiff may have
had arose the moment Mrs. Dwyer received the property from him,
and that such rights had duly vested in the alien property custodian.

Bogert is to the same effect.

Plaintiff having failed to persuade me that my original views were erroneous, I grant defendant's motion to dismiss the complaint on grounds of res judicata.

SO ORDERED.

Dated: New York, New York
March 12, 1976.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

- Plaintiff's actual reference is to the brief of the United States amicus curiae in Kawato. However, plaintiff does not indicate how that brief could be here relevant.
- Insofar as it is arguable that the prior litigation did not encompass plaintiff's novel theory that at some time after the vesting order a new duty arose in Mrs. Dwyer which was totally unrelated to her receipt of assets from plaintiff, I dismiss that claim as frivolous.

NOTICE OF MOTION FOR LEAVE TO SERVE AMENDED COMPLAINT & FOR SUMMARY JUDGMENT

1083a

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff.

-against-

LOUIS H. HALL, JR., as Executor : of the Estate of HELEN B.DWYER,

Defendant.

76 Ca. 200

NOTICE OF MOTION
FOR LEAVE TO SERVE AMENDED
COMPLAINT, ALSO FOR SUMMARY
JUDGMENT AND IN THE ALTERNATIVE
TO ENTER JUDGMENT PURSUANT TO
ORDER ENTERED MARCH 15, 1976.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of WERNER
GALLESKI, Esq., sworn to April 20, 1976, the proposed amended complaint,
all prior proceedings herein, the record on file in this Court, Index No. 69 Civ.
1939, and the record on file in the United States Court of Appeals for the Second
Circuit, Nos. 75-7696, and 76-7038, plaintiff will move this Court before
Hon. Whitman Knapp, United States District Judge for the Southern District
of New York, in Courtroom 905 at 2:00 p.m. on May 7, 1976, at the Courthouse,
Foley Square, New York, New York, for the following relief:

- (a) For an Order pursuant to Rule 15, Federal Rules of Civil Procedure, granting plaintiff leave to serve an amended complaint on the ground that instice so requires, and
- (b) an Order pursuant to Rule 56, Federal Rules of Civil Procedure, awarding summary judgment to the plaintiff on the ground that there are no genuine issues of fact and that as a matter of law the defendant has no defense herein,

impressing a constructive trust upon the gift property in the hands of the defendant and directing him to account with respect thereof, plaintiff's claim for damages not being an adequate remedy at law, and

- (c) in the event of a denial of the foregoin, branches (a) and (b) of this motion for an Order pursuant to Rule 58, Federal Rules of Civil Procedure, directing entry of summary judgment for defendant on the ground that the Order entered herein on March 15, 1976, is a final decision granting summary judgment for defendant pursuant to his motion dated February 17, 1976, and denying plaintiff's cross-motion for summary judgment in plaintiff's favor, and
 - (d) such additional or different relief as the Court may deem just.

Dated, New York, New York, April 20, 1976.

1 11

Yours, etc.

WERNER GALLESKI Attorney for Plaintiff Office & P.O. Address 450 Park Avenue New York, New York, 10022 Phone: 371 9040

TO: Messrs. Turchin & Topper Attorneys for Defendant 60 East 42 Street New York, New York, 10017

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Messrs. Martin, Obermaier & Mo'rvillo Attorneys for Defendant 1290 Avenue of the Americas New York, New York 10019

AFFIDAVIT OF WERNER GALLESKI IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK		
	:	
KURT SCHMIEDER,	:	76 Civ. 499
Plaintiff,	:	70 (10, 477)
-against-	:	AFFIDAVIT
LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,	:	
	:	;
"Defendant.		

STATE OF NEW YORK) COUNTY OF NEW YORK) SS.:

and says:

WERNER GALLESKI, being duly sworn, deposes

I am the attorney of record for the plaintiff and make this affidavit in support of plaintiff's motion for amendment of the complaint, also for summary judgment, and in the alternative for an order directing entry of judgment for defendant on the basis of Memorandum and Order No. 44060, dated March 1.' and entered March 15, 1976, which in plaintiff's analysis granted defendant's motion for summary judgment and denied plaintiff's cross-motion for summary judgment.

(A) To Amend the Complaint.

Enclosed hereto is the proposed amended complaint. It conforms to the original complaint except for an addition of new paragraphs 33 through 37. Such new matter, in plaintiff's submission, serves to aignify the character and scope of

plaintiff's claim so as to eliminate any defense of res judicata herein.

The basic holding of this Court has been that "whatever rights plaintiff may have had arose the moment Mrs. Dwyer received the property from him, and that such rights had duly vested in the alien property custodian" (Memorandem and Order No. 44060 page 4). Footnote 2 thereto interpret plaintiff's contrary theory to the effect that, according to plaintiff, ".... at some time after the vesting order - a new duty arose in Mrs. Dwyer which was totally unrelated to her receipt of assets from plaintiff."

Plaintiff has never intended to claim a post-vesting duty on the part of Dwyer which was unrelated to her receipt of the gift property from plaintiff. He regrets any imperfection of expression to that effect, apparently arising from his steady reliance upon infinite powers of the conscience of equity as a source for the remedy of constructive trust. Step by step, as a matter of pleading, the Court is respectfully requested to accept this clarification by means of new pleadings referred to as follows:

The wrong complained of herein was undue influence committed
by Hall Jr. and Dwyer in joint execution of practice of law. Therefore
the claim (at law) for damages arose in 1938. So the new # 33.

The claim for damages by reason of loss of property does not amount
to, and rather is inconsistent with, a claim for restitution of the property.

A vesting of property does not affect the damage claim of a former owner
for its loss. This distinction was clearly worked out by Learned Hand, then

District Judge, in Stochr v. Miller, in his opinion dismissing the complaint in this Court, Cases in Point, 2d Circuit, Vol. 1939 # 343, record page 180;

March St. Carlotte

of the plaintiff to the Germans, and while a transfer (perhaps even though in invitum), of the debt includes the lien, a transfer of the lien does not include the debt. At any rate that is the usual rule, Mirritt vs. Bartholick, 36 N.Y., 44, Carpenter vs. Langan, 16 Wall., 271, 274, Baldwin vs. Raples, 4 Ben., 433, 442. The capture must therefore rest wholly upon the declarations of trust and the assignment, and the case has been argued on that theory."

Accordingly, if plaintiff's tort claim against Dwyer had been vested and if the lost porperty (against which plaintiff can, depending on equitable circumstances, take remedial relief) had not been vested, then there could, in the light of existing equities, be room for an examination whether the claim for remedial relief against the property is also vested. But not possibility of expansion of the vesting effect so as to comprise the subsidiary claim for remedial relief exists where the personal obligation of the wrong-doer has, as here, been left unvested. The resulting independent legal nature of the tort claim (without any interest of plaintiff remaining in the property) and the absence of a vesting thereof are pleaded in the new ## 34 and 35.

Up to the granting of a decree impressing a constructive trust,
the defrauded grantor of real property had under New York law,

interest in the lost property and is a mere "owner of an obligation or chose in action", and upon his application only will jurisdiction be exercised to undo the transfer.

The judicial function is "to undo rather than to enforce... since justice might fail if remedies were rigid". The wife of the defrauded grantor (Clymasic Surprice)

meanwhile has no dower right in the property as long as her husband, the defrauded grantor, is unwilling to assume the burden of seeking redress for a fraud which another has practiced upon him. "The law will not create the estate in order to subject it to the incident."

Equity would fail if plaintiff's claim for constructive trust were deemed to have arisen at a time when it would have been subject to vesting. On the basis of the exigencies of equity, the claim for such remedial relief arose at the earliest in 1967 as pleaded in the new # 36.

A new # 37 relies on the principle of unjust enrichment which makes it unnecessary for plaintiff to show a loss on his part commensurate with the unjust enrichment remedially claimed from the defendant as digested by Scott on Trusts (Third Edition 1967) Par. 462. 2 page 341:

enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff. Thus if the defendant has made a profit through the violation of a duty to the plaintiff to whom he is in a fiduciary relation, he can be compelled to surrender the profit to the plaintiff. So also where the defendant wrongfully uses the property of the plaintiff in making a

profit, he can be compelled to surrender the profit. The defendant will not be permitted to retain the profit in such cases even though there has been no loss to the plaintiff. The defendant should not be permitted to enrich himself by retaining the profit, and will therefore be compelled to surrender it to the plaintiff. In these cases the effect of enforcing a constructive trust is not merely to put the parties in statu quo.

(emphasis supplied)

The aforedescribed proposed amendment of the complaint does not prejudice the defendant who has not filed any answer as yet. In any event, justice will be promoted by the requested amendment in that a number of matters negating res judicata and supporting the merits of the complaint are thereby raised.

(B) For Summary Judgment.

In support of summary judgment for plaintiff, I respectfully refer to my three affirmation. filed in opposition to defendant's prior motion to dismiss the complaint on the ground of res judicata (against which motion plaintiff cross-moved for summary judgment upon the theory that defendant's said motion was for summary judgment), and also to the foregoing part (A) of my present affidavit.

I respectfully pray for permission still to serve a mem randum of law and statement under Local Rule 9 (g) on or before April 27, 1976, i.e. at least ten days prior to the return date herein. The immediate service of the notice of motion and the within moving affidavit is

necessary because a rescheduling motion is due in the Court of Appeals for the pending appeals from the judgment and post-judgment orders in the action 69 Civ. 1939. To explain the procedural background Lam enclosing copy of the papers supporting the said rescheduling motion.

Werner Gallesk

Sworn to before me this 20th day of April 1976.

Syplice Echelocolt

Notary Public, State of New York
No. 41-6143710
Qualified in Queens County
Commitsed Section 30 197 8

PAPERS ANNEXED TO FOREGOING AFFIDAVIT

PROPOSED AMENDED COMPLAINT

UNIT	F.1)	ST	ATES	DIST	RIC	TCO	URT
SOUT	HE	RN	DISTI	RICT	OF.	NEW	YORK

KURT SCHMIEDER,

Plaintiff,

-against-

LOUIS H. HALL, Jr., as Executor of the Estate of HELEN B. DWYER,

Defendant.

PROPOSED AMENDED COMPLAI

76 Civ. 499

Plaintiff, by his attorney WERNER GALLESKI, for his complaint against the above named defendant, respectfully alleges upon information and belief except as to matter set forth in paragraphs 13), 28) and 30) which are alleged upon knowledge.

For a First Cause of Action (Federal Question Action):

1) This action arises under Federal Common Law upon which the Alien Enemy Act of 1798 (50 USCA Sec. 21) and the Trading with the Enemy Act of 1917 (50 USCA App. Sec. 1), have been built. It is predicated upon wrong-doing on the part of HELEM B. DWYER and the defendant, respectively, in that Dwyer has retained and the defendant still retains, certain property (originally owned by plaintiff) is beyond the time when the conscience of equity called for the turn-over of such property to the plaintiff, and when the Federal Common Law, hostile to a windfall in favor of persons other than either the US Government or the original enemy owner called for such turn-over.

Remedial relief is sought by means of an impression of a constructive trust upon property held by the defendant.

- 2) In or about 1928 plaintiff, a German national, received from the US Government a partial return of property which had been vested as enemy property in World War I.
- 3) In or about 1923 plaintiff issued a power of attorney whereunder LCDIS H. HALL Sr., attorney at law at the City of New York, was empowered to act as plaintiff's attorney-in-fact in regard to securities and cash deposited with New York Trust Company.
- 4) From then on Hall Sr. advised plaintiff in regard to the property, which remained invested in the United States.
- 5) Under the legal stewardship of Hall Sr., part of the said property was, in or about 1935, invested in a corporation organized by Hall Sr. for that purpose, with its stock and claims for repayment of cash advances nominally held by JENNY BOCHMANN, now deceased, who was plaintiff's sister-in-law and resided in Switzerland.
- 6) In or about 1937, Hall Sr. advised plaintiff that, for the purpose of protecting him from the consequences of his violation of German foreign exchange control and related laws, he should transfer the said stock and cash claims to a US dones to be appointed by Hall Sr., with the puviso that Hall Sr. would be able to act

in that transaction only if there were no strings attached so that the transfer was absolute, irrevocable and without imposition of any obligation upon the donce. Plaintiff accepted that advice and Hall Sr. selected as donce HELEN B. DWYER, who then was and had since about 1929 been his personal secretary.

- 7) On or about March 15, 1938, and pursuant to Hall Sr.'s advice, plaintiff transferred the said stock and claims to Dwyer.
- 8) Plaintiff had never met Dwyer nor did he know of her prior to the arrangement of the gift to her.
- 9) Plaintiff had unlimited confidence in the competence and integrity of Hall Sr. He believed it to be in his best interest to follow Hall Sr. 's advice.
- Plaintiff considered it as axiomatic that Dwyer (whatever her absolute rights, the irrevocability of the gift, and her freedom from any obligation would legally amount to, and however strongly and effectively he would be deprived of any type of legal or moral right in respect of the gift property) could not in good conscience hold on to his life savings after the emergency had passed.
- Plaintiff had an indefinite number of recourses alternative to the making of the gift. Except for his political loath and disgust, he was free to settle with the Nazis. Or he could have looked for a number of available types of anonymous investments abroad.
- 12) Defendant is Hall Sr's son. About 1934 he became associated with Hall Sr's

law firm. He now is a senior partner thereof. He participated in the legal work for plaintiff or his nominee Bochmann from about 1935.

- As to the 1938 gift transaction and the matters of legality and morality as well as the windfall aspect there involved, defendant testified upon an examination before trial in the Matter of the Probate of the Will of Helen B. Dwyer New York County Surrogate's Court, File No. 4663/1970 Examination of Louis H. Hall Jr. on December 7, 1970, pp. 79-82, as follows:
 - Q Were you aware of the reason or reasons for the transfer from Jennie Bochman to Mrs. Dwyer?
 - A No. As I understand it, it was a gift from Jennie Bochman to Helen Dwyer.
 - Q Were there any documents given, or any letters making a statement to that?
 - A There must have been.

* 1. p - 1! ...

- Q Do you know or don't you?
- A I don't know. I cannot recall if there were any documents, but I think that there must have been. I was not in on the discussion of all of this I was merely told that the transfer had been made, and to do the necessary to effectuate the corporation, get the shares issued and so on.
- Q Where did Jennie Bochman reside?
- A She was in Europe, Switzerland, and she is dead.
- Q Do you know whether Mrs. Dwyer had ever known Mrs. Bochman?
- A She did not know her.

- Q Did you learn of the reason for the gift by Mrs. Bochman to Mrs Dwyer of these assets?
- A llearned of it later, I didn't at the time. I was not in on the operation when the gift was made, I learned of it later.
- Q When did you learn of it?

MR. OWEN: Are you referring to the year? MR. DUFFY: As best as he can recall.

- A This was about 33 years ago.
- Q I am asking for your best recollection.
- A Well, that's difficult. It was probably shortly after the transfer was made because I don't recall whether I was told at the time of the transfer. I was told to arrange for it, but now, I don't know.
- Q What was the reason that you were given for the transfer?
- A That it was a gift to her, that the person who was giving it had asked whether she could put her funds over here, she hoped that st would be able to have the funds held for her in her account and returned to her, and my father advised Mr. Graupner that there was absolutely no way that that could be done legally, and he also told Mr. Graupner, I was told, that the only thing that the person rould do would be to make an outright gift of it with no strings attached, and with no understanding, legally, morally, or otherwise, and the suggestion was that the person had to fulfull his legal responsibility, or would be in danger of imprisonment or worse.
- Q Did you arrange for this transfer, or was it your father?
- A That would be my father.
- Q So that the transfer of these shares, and the underlying assets were then carried out with the intention of being a gift, is that right?
- A That's my understanding.
- Q Do you recall being told how Mrs. Dwyer was selected to be the recipient?
- A Yes, I don't know if I can remember exactly what

1096a it was, but basically the instructions came back from Mr. Graupner that Mrs. Bochman definitely wanted to dispose of this property completely and had no one herself to name, and wanted Mr. Grauph. or my father, or someone to find a recipient. The question in their minds was: Here is a windfall for someone. My father didn't want any part of it obviously being connected as an attorney in the matter. Mr. Graupner didn't want any part of it. He didn't? Q No, he was a friend and client of my father's. Q Yes. They wanted to give it to a complete stranger. A complete stranger could have been the person, provided that the stranger would accept it, and they thought of a deserving person who deserved the windfall, and luckily, or unluckily Mrs. Dwyer

Q On the advice that it was a complete gift?

condition on their advice.

A As a complete gift, because otherwise it would have been illegal, and immoral to receive it and hold it with any obligation whatsoever to return it.

was elected as such a person and she accepted only on this

- 14) During World War II the gift property in Dwyer's hands was blocked under the freezing regulations and later on vested under the Trading with the Enemy Act as property controlled by the plaintiff.
- 15) Dwyer brought an action for return of the vested property to her on the ground that she was the sole beneficial owner thereof immediately prior to vesting. She entered upon a settlement out of court with the US Government and received certain cash and stock certificates.

- Plaintiff was a member of the Stahlhelm, a conservative paramilitary ory nization in support of such democratic and orderly principles of government as could approximately be germane to a liberal constitutional monarchy.
- 17) In or about 1934 the Stahlhelm was forcibly incorporated into the Storm Troopers, the foremost non-clite paramilitary organization in Nazi Germany.
- Dreading the thought of having to wear a brown shirt, plaintiff applied for and received his discharge from the nazified Stahlhelm and adhered to a group of former Stahlhelm members who either had been dispelled from the Stahlhelm by reason of their religion, race or political creed or left by their own volition like plaintiff.
- 19) By reason of the known feature of plaintiff's open and generally observable resistance to the Nazi regime he sustained substantial discrimination, restriction and damage in regard to his property and liberty.
- During World War II plaintiff was in contact with, and visited the apartment of Theodor Duesterberg, who was the projected Minister of War under the would-be Prime Minister Goerdeler whose revolutionary attempt to overthrow the Nazi Government failed in July 1944. Prior to nazification Duesterberg had been the Second Leader of the Stahlhelm. He was expelled because he had one racially Jewish grandmother.

- Upon cessation of hostilities in 1945, the underground minority sector of the Stahlhelm, to which plaintiff belonged, was reorganized as a post-war Stahlhelm under ticense of the Allied Military Government.
- After World War II until 1952 plaintiff was persecuted and variously imprisoned in the Soviet-Occupied-Zone for his anti-communist activities in the Soviet-Occupied-Zone in Germany.
- 23) HALL SR died in 1949. Dwyer thereafter continued as personal secretary for defendant until 1953.
- 24) Plaintiff endeavored but was unable to find Dwyer until 1967.
- Dwyer died in May 1970. The elefendant was in or about 1972 appointed final executor of her estate, upon settlement of a probate contest (objections having been based upon undue influence) with statutory distributees, providing for substantial payments to such distributees. Principal beneficiaries under Dwyer's will are the defendant and his two sisters.
- of Hall Sr. and the defendant, made testamentary dispositions and intervivos dispositions predicated upon her death principally and basically for the benefit of the defendant and his sisters. The domination of Dwyer by Hall Sr. and the defendant forced her to resist plaintiff's demands concerning the gift property

in 1967 and thereafter.

- 27) The retention of the gift property violates
- (a) the conscience of equity because plaintiff parted with his property in distress and under combined professional guidance of Hall Sr.,

 Dwyer and the defendant;
- (b) "the sound principle of common law today" pursuant to which, where ".... the public welfare demands—that this alien shall not receive....

 paym nt.... the government can make the decision without allowing a windfall...."

 (Ex Parte Kumazo Kawato, 1942, 317 US 69, 74, 75).

For a Second Cause of Action (Diversity Action)

- 28) Plaintiff is a c.tizen and resident of the Federal Republic of Germany.
- Defendant is a citizen and resident of the State of Connecticut. Dwyer, his decedent, was at the time of her death a citizen and resident of the State of New York.
- 30) The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.
- 31) The allegations under paragraphs 2) through 27) herein are referred to with the same force and effect as if they were set forth herein at length.

- Under both or either of the foregoing causes of action, plaintiff claims monetary damages and unjust enrichment amounting to the value (in excess of \$700,000) of the gift property at the time—as of which the Court shall find that the retention of the gift property by Dwyer and the defendant, respectively, must in equity be treated as unfair, unconscionable, and unjust, and in the alternative and to the extent that the Court shall find that such monetary damages and other compensatory payment shall not constitute an adequate remedy, for impression of a constructive trust upon the assets held by the defendant.
- Both causes of action for damages arose in 1938 upon the transfer of the gift property from plaintiff to Dwyer.
- Neither cause of action constitutes an interest in any property. Each cause rather is a general claim for damages unrelated to any interest in specific property.
- 35) Neither cause of action was purported to have been, nor was it, vested as enemy property.
- The claim for remedial relief by way of impression of a constructive trust on the ground of windfall and unjust enrichment arose after 1967 when plaintiff elected to assert his claim and the retention of the gift property by Dwyer became unconscionable.

37) Defendant's unjust enrichment is to be measured on the basis of the value of Dwyer's and his wrongful retention of the property, regardless of any consonant loss on the part of the plaintiff.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

- 1. For \$700,000 to redress the wrong of retention of the gift property with interest from the date from which the retention shall be adjudicated to have been in violation of the conscience of equity.
- II. In the alternative (if the Court shall find the remedy under I to be inadequate):
 - (a) That a trust be impressed upon the assets held by the defendant;
 - (b) That the defendant be enjoined and stayed from disposing of any part of said trust property until such time as a determination is had of plaintiff's rights and the amounts of plaintiff's interests are established, adjudged and paid;

- (c) That defendant be directed and compelled to account to the plaintiff so as to (accountingwise) identify the gift property as of the time when its retention became wrongful, as well as for all income and profits thereafter accrued thereon.
- (d) That the defendant be decreed, adjudged and directed to pay and deliver over to the plaintiff the said property and all profits and proceeds directly or indirectly derived therefrom which may be found to be due to the plaintifi:

III. That the plaintiff has the foregoing and such other, further and different relief as to this Court may seem just and proper in the premises, together with the costs and disbursements of this action.

Werner Galleski Attorney for Plaintiff 450 Park Avenue New York, New York, 10022 Phone: 371 9040

MOTION FOR EXTENTION OF TIME TO FILE RECORD

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

KURT SCHMIEDER,

Appellant,

VS.

LOUIS H. HALL, Jr., as Preliminary Executor of the Estate of HELEN B. DWYER,

Appellee.

TWO APPEALS

Docket No. 75-7696 Docket No. 76-7038

MOTION TO EXTEND APPELLANT'S TIME
TO FILE RECORD AND APPELL ANT'S BRIEF WITH JOINT
APPENDIX ON BOTH APPEALS.

Appellant, KURT SCHMIEDER, moves the Court pursuant to the Federal Rules of Appellate Procedure, Rules 26 (b) and 27 (b) and pursuant to Rule 27 (e) of the Rules of this Court to extend on both appeals until May 26, 1976 the time within which appellant must file the record on appeal (under scheduling orders due by April 26, 1976,) and until June 5, 1976, the time to file appellant's brief and the joint appendix (presently due by May 5, 1976), and as grounds therefor respectfully shows:

- (1) The direct subject-matter of the within Appeal No. 75-7696 is the judgment of the court below (Southern District, 69 Civ. 1939). The within Appeal No. 76-7038 has been taken from post-judgment orders denying relief under FRCP 60 (b), which relief was paramountly sought on the basis of ambiguities and resulting nullity of the judgment.
- In the two appellate proceedings herein, praintiff appellant moved in this Court to vacate the judgment below on the basis of the four corners of the documents connected therewith. Defendant-appellee's opposition leaned upon the record as a whole. By two Orders dated March 16, 1976, this Court denied the motion to vacate the judgment "without prejudice to renewal before panel to hear appeal".
- (3) In the course of the proceedings below pursuant to FRCP 60 (b), plaintiff-appellant suggested a new complaint(setting forth a claim for windfall and unjust enrichment) and prayed for clarification as to whether the claim set forth therein was covered by the judgment (which dealt with fraud and conspiracy only). The court below decided by Memorandum and Order entered December 11, 1975, (attached hereto as Exhibit "A"):

"that the original Opinion answers the question presented by the second motion for relief from judgment, and that any attempt to clarify would be futile. However, I shall state that it is my belief that res adjudicate would bar the new action;"

1105a and by Memorandum and Order entered December 22, 1976, (attached hereto as Exhibit "B"): "If plaintiff is in doubt as to this, I suggest that he file his proposed new complaint and ask that it be referred to me as a related case. I shall then enter an order dismissing it, on ground of res judicata, and plaintiff can immediately appeal from that order and request the Court of Appeals to consolidate both appeals." On Januar 30, 1976, plaintiff -appellant filed his new complaint substantially in conformity with the complaint suggested before (Southern District, 76 Civ. 499). Defendant-appellee thereupon moved "for the following relief on the ground of res judicata based upon this Court's judgment dismissing the prior identical complaint after trial: (1) judgment dismissing this complaint pursuant to

in the alternative

(2) summary judgment dismissing this complaint pursuant to Rule 56 of the Federal Rules of Civil

Federal Rules of Civil Procedure, Rule 12 (b)(6) or,

Plaintiff-appellant filed papers in opposition and cross-moved for summary judgment. In his Memorandum and Order entered March 15, 1976, (attached

"Defendant moves to dismiss the complaint on grounds of res judicata, claiming that all issues tendered by the instant complaint have been decided adversely to plaintiff in a previous action between the same parties having the same caption and bearing Index No. 69 Civ. 1939.

hereto as Exhibit "C") the court below decided as follows:

Procedure, "

"The complaint in the 1969 action was dismissed after a bench trial. After plaintiff had appealed to the Court of Appeals, he made a motion for reargument before me. In denying that motion, I observed:

(quotation omitted)

"The suggestions contained in the above question (should probably read: 'quotation') were followed by all concerned. Plaintiff filed his new complaint, the Clerk of the Court referred it to me as related to the previous action, and defendant moved to dismiss on ground of res judicata. I follow my predicted course of action, and grant defendant's motion."

(discussion of authorities mitted)

"Plaintiff having failed to perstade me that my original views were erroneous, I grant defendant's motion to dismiss the complaint on ground of res judicata.

SO ORDERED."

(5) Together with the present motion for extension of time for extension of time, plaintiff-appellant is serving papers in support of his motion in the action 76 Civ. 499 below for leave to file an amended complaint, for summary judgment and in the alternative for entry of judgment for defendant on the basis of the Order entered March 15, 1976. Copies of the respective notice of motion, the proposed amended complaint and the moving affidavit are attached hereto as Exhibits DI, D. II and DIII.

1107a Upon the oral argument on March 16, 1976, of plaintiff-appellant's motion to vacate the judgment below in the action 69 Civ. 1939, Circuit Judge Mulligan, as Presiding Judge, seemed to express approval of Judge Knapp's technique of protecting due process through consolidation of all appellate review. Defendant-appellee can hardly object thereto because in his view the complaints in the two actions are "identical" (so his notice of motion to dismiss the complaint, dated February 17, 1976). (7)The apparent delay of a final decision or of the entry of judgment in the new action 76 Civ. 499 is in no way caused by plaintiff-appellant. Prior to entry thereof, the judgment can however not be appealed from, and plaintiffappellant is prevented from applying for consolidation of all appeals herein, including the appeal to be taken from the aforementioned judgment still to be entered. (8) Plaintiff-appellant estimates that the minimum delay herein amounts to one month from the presently scheduled timetable. An attempt to stipulate with opposing counsel as to extension of fine (9) was without success. Dated, April 20, 1976 Werner Galleski Attorney for Appellant P.O. Address: 450 Park Avenue New York, N.Y. 10022 TO: Phone: 371 9040 (see next page)

Turchin & Topper 60 East 42 Street New York, New York, 10017 Attorneys for Appellee

Martin, Obermayer & Morvillo 1290 Avenue of the Americas New York, New York, 10019 Attorneys for Appellee

Berg & Duff; 3000 Marcus Avenue Lake Success, New York, 11040 Counsel to Appellant UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff, :

-against-

LOUIS H. HALL, Jr., as Executor of the Estate of HELEN B. DWYER,

76 Civ. 199

Defendant.

Plaintiff's Statement under Rule 9 (g)

of the General Rules of this Court,
in Support of Plaintiff's Motion for
Summary Judgment.

are these:

- (1) Plaintiff was the beneficial owner of the gift property immediately prior to the gift.
- (2) Plaintiff was exposed to criminal prosecution by the Nazis.
- (3) He transferred absolute title upon Dwyer.
- (4) Plaintiff made the gift pursuant to advice of his attorney, Harr. Sr.
- (5) Dwyer then was the personal secretary of Hall Sr.
- (6) The property held by Dwyer was vested.
- (7) Under a settlement with the Attorney General Dwyer received a partial return of the vested property.

- (8) Hall Jr. refused assistance to plaintiff and referred him to the absolute character of the gift.
- (9) In 1967 plaintiff located Dwyer.
- (10) Shortly thereafter Dwyer repudiated any duty toward plaintiff.
- (ll) Plaintiff's primary claim for damages is not an adequate remedy.
- (12) On that basis and for the purposes of the present motion, plaintiff elects remedial impression of a constructive trust upon the property held by the 'defendant.

Dated: New York, New York, April 27, 1976

Werner Galleski Attorney for Plaintiff

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

76 Civ. 499

Plaintiff

- against -

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The within action sounds in constructive or equitable fraud, based upon the wrongs of unlawful windfall under federal common law (federal question action) and unjust enrichment (diversity action). Plaintiff pleads no actual fraud and no deception deliberately practiced upon him by the defendant. He pleads acts which operated as a fraud in law, even if defendant and his decedent did not intend them to be such. At law plaintiff prays for damages. In case of adequate exigency under equitable principles, he, by way of equitable remedial relief, seeks impression of a constructive trust upon assets held by the defendant.

Defendant filed no answer. He moved to dismiss the complaint on grounds of res judicata and so the Court did.

Plaintiff now moves (a) for leave to file an amended complaint,

(b) for summary judgment impressing a constructive trust upon the assets held by the defendant, damages in plaintiff's submission not being adequate at law, and (c) in the event of denial of (a) and (b) for treatment of the Memorandum and Order entered March 15, 1976, dismissing the original complaint, as a final decision of summary judgment for defendant, incidentally denying plaintiff's earlier cross+motion for summary judgment.

Salient points relating to Branch (b) of said motion, viz., for summary judgment are submitted below. Apart therefrom, all arguments advanced by plaintiff hereinbefore and in Action No. 1 are respectfully preserved.

Plaintiff -Appellant moved in the Court of Appeals to vacate the judgment in Action No. I as null and void or to dismiss his appeal on the ground of non-finality of the judgment. The motion was denied on March 16, 1976, "without prejudice to renew before panel to hear appeal". Plaintiff summarily begs to reserve his (previously submitted) defenses to resignificate under the aspects of nullity and non-finality of the judgment in Action No. 1.

POINT I. No type of res judicata is applicable.

(a) There is no claim preclusion / res judicata.

The Opinion in Action No. 1, dated September 25, 1975, by its second sentence, describes the remedial relief (constructive trust)

on page 1, line 11, that plaintiff alleges to have been "defrauded". The last and conclusory page of the Opinion culminates in the decision that "plaintiff has failed to satisfy his burden of proof", which burden quired him to prove "that Mrs. Dwyer and Hall Sr. had in 1938 embarked upon and consummated a conspiracy to defraud".

A constructive or equitable fraud would not have involved such burden. It "does not necessarily involve any evil or corrupt intention or imply that the transaction was conceived in iniquity" (so 24 NY Jurisprudence, Fraud and Deceit, Sec. 137, p. 192 at footnote 9, citing Shientag, J., Specia, Term New York County, 1934, in Jothann v.

Irving Trust Co., 151 M 10, 270 NYS 721, aff. 243 AD 691, 277 NYS 795, and Edgecomb, J., Equity Term, Lewis County, 1923, in Seymour v. Seymour, 120 M 525, 199 NYS 21. Shientag, J., supra, succinctly defines the equitable imperative which the law imposes upon parties not dealing at arms, length:

"It is true that you have had no evil intention to do a wrengful act, but the consequences of your conduct would be so unfair, so unconscionable, that we will not permit you to take advantage of the dependence, the weakness of the one who relied on you and who trusted you to protect and safeguard (his) interests."

Still, the Opinion nowhere went into a discussion of operative acts which constitute constructive fraud and are deemed fraudulent in law without showing actual fraud. Plaintiff suggests that such clear concentration

upon a claim of fraud and deceit amounts to a non-adjudication of the claim for constructive fraud. Clarification of this aspect was pursued by plaintiff's motion under FRCP 60 (b) in Action No. 1 to protect due process and promote an unambiguous judgment.

Apparently appreciating the claim of equitable fraud not primarily and substantively as one for damages but as a "claim in the fund" Court No. 1 decided by Order entered December 11, 1975:

state that it is my belief that res judicata would bar the new action which - as I gather - plaintiff proposes to commence. The original holding was to the effect that the vesting order had cut off all rights of every description which plaintiff had or could claim in the fund. Thereafter, since plaintiff had no claims of any kind against the fund, there was nothing of which any fraud by defendant could have deprived him."

The express non-clarification whether the judgment encompassed an adjudication of the claim for constructive fraud makes it impossible to find an ident. Detween the claim adjudicated and the claim now pending.

An incidence of claim preclusion/res judicata is additionally excluded by the subsequent Order entered December 22, 1975, whose invocation of the doctrine of res judicata can only point to issue preclusion / res judicata (sometimes called collateral estoppel):

plaintiff had no standing in law or equity or otherwise to challenge defendant's possession of the property received by Mrs. Dwyer as a result of the settlement of her suit against the government; and (b) the second part held that, assuming such standing, plaintiff had not established entitlement to the monies in question on the ground of fraud (equitable or other), unjust carichment or otherwise. If the Court of

Appeals upholds either such holding, the plaintiff is, in my view, forever foreclosed."

Part (a) of the foregoing decision deals with the issue of whether plaintiff has "standing" to challenge defendant's possession of certain property. Part (b) of the said decision concerns the issue of whether plaintiff has established entitlement to the monies in question. Both issues are distinct from any adjudication of plaintiff's constructive fraud claim as a whole, as prosecuted in Action No. 2 primarily and substantively for damages without any challenge to possession of, or entitlement to, any property or monies in question. Plaintiff substantively claims to be a general creditor of the defendant.

Accordingly, the claims adjudicated in Action No. 1 and prosecuted in Action No. 2 are not identical.

> (b) There is no issue preclusion / res judicata (Collateral Estoppel).

Defendant's exposition of his res judicata defense (Memorandum in support of his prior motion to dismiss the complaint) claims inconsistently -

> or its page 2 that the post-judgment Orders under FRCP 60 (b) amended the adjudication to the effect that "the Court held....that... plaintiff had not shown he was entitled to the property either in law or equity, under a theory of fraud, unjust enrichtment, or under any other theory". and on its page that the judgment in Action No.1 has not been

modified.

In this respect it is plaintiff's submission that the views stated in the said Orders were dicta only. The Court expounded that a clarification as to what was adjudicated, as requested by plaintiff, "would be futile".

This is either a denial of the motion or a non-adjudication be either event, it cannot trigger any preclusion.

As regards the Opinion dated September 25, 1975, it is plaintiff's position that many findings therein do exercise an issue preclusion / resignation judicata effect between the parties on the ground that certain issues were actually and fairly litigated as well as necessarily determined in Action No. 1 regardless of the nullity and non-finality of the judgment, all in compliance with the classical requirements under Cremwell v. County of Sac, 1876, 94 US 351.

Even assuming the said dicta in the two post-judgment Orders under FRCP 60 (b) to be adjudications, they cannot work any issue preclusion against Action No. 2 because Action No. 2 is not predicated upon any challenge of any possession of property or upon an entitlement of plaintiff to any monies (as distinguished from a general claim for money). A specific in remaspect is, by way of remedial relief, carried into Action No. 2 on a post-vesting basis only, as of 1967 or later. Commany thereto, the said dicta presuppose that plaintiff's claim had that in rem character prior to the vesting and was consequently wiped out by the vesting order. The legal nature of plaintiff's right to elect a constructive trust, and its immunity

from vesting, is discussed in the following point.

POINT II: The still unexercised right to elect a constructive trust is not subject to vesting.

It is settled law that the optional procedural right to elect the impression of a constructive trust on the ground that the remedy for damages at law would not offer adequate redress from a wrong cannot be confiscated as long as the option has not been exercised. The right to exercise such option is a personal right which "cannot be forced upon a cestui que trust against his will" (Stoehr v. Miller, 296 F 414, 425, 426 (CCA 2d, 1923). "Whether a renunciation of the German cestuis que trustent had been made in order to defeat the seizure which the Alien Property Custodian had made.... would be quite immaterial. They owed no duty to the United States, and the seizure of the property by the Alien Property Custodian did not deprive them of their right to renounce. We fail to see how their renunciation defeated any lawful purposes of the Trading with the Enemy Act. If the consequence of the renunciation is to revest the property in the hands of an American citizen no wrong to the United States is done." Thereupon the Court of Appeals dealt with the government's argument that the renounciation of their beneficiary status under certain arrangements did not affect their right to elect a constructive trust and that under such viewpoint the seizure should be sustained. Not so the Court: "Constructive trusts are those which arise purely by construction of equity, and wholly independent of any actual or presumed

intention of the parties..... The right of the (German parties) was a right of election to proceed in personam for damages or in rem against (the property). The constructive trust never came into existence because if the right to elect to assert it existed it was never exercised and the right to assert if came to an end when (the German parties) accepted the German properties which (the American rties) transferred to them. So that a constructive trust at no time existed for it could not arise until the cestuis que trustent elected to assert if - and this they never did. The German parties never were "the equitable owners of (the property) under any theory of a constructive trust, for they never elected to assert any rights under a constructive trusteeship which rights were personal to them under the doctrine of election....."

(emphasis supplied)

An other notable case upholding the immunity of personal rights of election from vesting under the Trading with the Enemy Act is Re Herter's Fetate (Surrogate Delehanty, N. Y. Co., 1948) 193 M 602, 83 NYS 2d 36, aff'd 274 AD 979, 84 NYS 2913, and 300 NY 532. The United States participated through US Attorney Mc Gohey and Assistant Attorney General Bazelon. No record of an attempt at certiorari has been traced. Surrogate Delehanty held that a German widow's right of election against the will of her American husband was 'no property right in esse but only a property right in posse which springs into existence only....as of the time of the exercise of the election."

The Court's decision, dismissing the complaint in Action No. 2 pages 3 and 4, holds that Stochr and Herter do not support plaintiff's position because in Stoehr "the alien property custodian acquired no title to an alien's alleged interest in a trust said to have been declared by an American citizen where, as the Court found, the declaration of trust had never become the non-exercise of effective" and because in both cases the personal right to elect accrued to the benefit of American citizens, which particularity conflicts with the concept of prejudice to the national interest of the United States. Thereagainst plaintiff respectfully urges (a) that it is a typical outgrow of the non-exercise of the option that Americans are benefitted thereby and (b) that in the case at bar Dwyer, a US citizen, was pro tempore so benefitted until circumstances developed which entitled and prompted plaintiff to assert his option rather than to prosecute his remedy for damages, and (c) that the American parties in Stoehr were not peremptorily benefitted either inasmuch as they gave up German property in exchange after the vesting.

The overriding aspect under the law of property must in plaintiff's suggestion, be the determinability as of the time of vesting whether a certain asset has or has not been effectively passed to the Custodian. It would create an unbearable uncertainty if the effect of the vesting remains in suspense for an indefinite time until it is known whether the mere omission to exercise the right of election will ripen into a renunciation and, if so, whether

it will benefit an American citizen. The ownership of property denotes rights against all the world and must be based on discernible criteria. These are firmly circumscribed by Justice Cardozo in full congruity with the rules established by Stoehr and Herter, in a generally controlling manner and without reference to the Trading with the Enemy Act. See Melenky v. Malen 1922, 233 NY 19, 22, 23: "Until the entry of a decree, the defrauded grantor is not the owner of an estate. He is the owner of an obligation, a chose in action... it is still 'a remedial expedient' (Pound....)". "This grantor....has not asked a court of equity to undo the conveyance and to re-establish the divested title. He is willing to let the transaction stand, or unwilling, at all events, to take active measures. " Justice Cardozo rejected the claim that the defrauded grantor's wife could claim dower in the property which the grantor had lost through undue influence: ".....jurisdiction would be exerted to undo rather than to enforce, or to enforce only as a substitute for undoing, since justice might fail if remedies were rigid..... The law will not create the estate in order to subject it to the incident", there of dower, presently of vesting. Plaintiff's chose in action was not vested.

PO:NT III: <u>Dwyer</u>, <u>like her employer Hall Sr.</u>, <u>was</u>
equitably disabled from receiving plaintiff's gift.

The landmark case dealing with the fiduciary responsibility of an employee of the primary fiduciary is Ogden v. Gardner, 1860, 22 NY 327.

The basic proposition for disqualification from taking the gift, is there (p. 343), following quotations from Sugden on Vend. and Pur., 13th ed., 566, defined to the effect that "trustees, agents, counsel, or any persons who, being employed or concerned in the affairs of another, have acquired knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will subsequently be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent". The culmination of that principle, uniform with its line of decision, is found by the highest court of the State of New York in the language of Lord Cranworth, House of Lords, in the 1854 case of Aberdeen Railway Co. v. Blaikee Brothers (1 Macq. 461), pursuant to which (pages 347 sq) "(s)o strictly is the principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into...... It may sometimes happen that the terms on which a trustee has dealt.....have been as good as could have been obtained from any other person: they may even, at the time, have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted. " Likewise, the New York State Court of Appeals adopted (pages 348 sq.) the holding of Judge Benson, (Court of Error, in Munroe v. Allaire 2 Caines' Cases in Error, 183): " Although it may..... seem hard that the trustees should be the only persons of all mankind who may not purchase, yet for the very obvious consequences it is proper that the rule should be strictly pursued, and not in the least relaxed."

Under the facts in Ogden (p. 842) the clerks, one of whom was the purchaser, "had access to the correspondence of the firm, were well acquainted with plaintiff's urgency to sell, his motives for so doing, and all the facts and circumstances connected with the property known to the plaintiff's agents; and, as the clerks of the firm, they owed the same duty to the plaintiff." Ogden (p. 350) expounds the fundamental rule that "the disability extends to all persons who, being employed or concerned in the affairs of another, acquired a knowledge of his property.

....It would work an entire abrogation of the rule to hold the principal subject to this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all its vitality and virtue......"

The precise point now under consideration arose before Vice-Chancellor Sandford in Poillon v. Martin (1 Sand. Ch. R, 569), where he held that the clerk of an attorney was as much prohibited from purchasing from a client as the attorney himself."

(emphasis supplied)

In the case at bar, Dwyer's involvement in the disability of her employer was more intense and multifold than in any of the cases which were found. She did not only have access to all the information within her employer's law firm, and she was not only a person who would partake in the confidence which plaintiff conferred upon Hall Sr. She also was the necessary participant in the transaction which Hall Sr. prescribed and controlled as counsel and dual agent for plaintiff and Dwyer at the same time. This went far beyond the usual functions of a personal secretary and charged her with an executive duty of supreme rank.

Her position as a co-client of Hall Sr. also subjected her to the rule on dual agency in Farr v. Newman, 1964, 14 NY 2d 183:

"The mere fact that the attorney acted for both parties.....
cannot insulate (Dwyer) from (her) agent's knowledge.....

".....(Dwyer) is bound by notice or knowledge of (her) agent in all matters within the scope of the agency although in fact the information may never have been communicated to (Dwyer).

A combination of the doctrines under <u>Ogden</u> and <u>Farr</u> makes it unnecessary to go into the conflict of interest issues which are additionally mentioned in <u>Farr</u> (where neither party was employed by a fiduciary for the other). The equity rule of <u>Ogden</u> aims for inflexible security against the abuse of confidence.

Consequently, it follows from the uncontested facts that Dwyer was equitably disabled from taking the gift.

POINT IV. Sommon law including the law of equity is superior to the Trading with the Enemy Act.

The action herein is based upon windfall abuse in violation of federal common law (federal question action) and upon violation of the common law of equity of the State of New York (diversity action). Both federal and state common law have priority over the Trading with the Enemy Act. In Ex Parte Kumazo Kawato,

1942, 317 US 69, the effect of common law rules concerning the right of

of resident enemy aliens to sue was in issue. The United States filed a Brief in favor of such action by way of a construction of Section 7 (b) of the Trading with the Enemy Act to the effect that it "does not in itself contain any affirmative prohibition against suits by enemies". "On the contrary, it provides only that nothing in the Act shall be deemed to authorize the prosecution of such suits. This language would seem to indicate that Congress was deliberately refraining from any legislative regulation of the subject, and was seeking merely to make certain that it was understood that the common law remained in effect."

Thereupon reference is made by footnote 18 to a number of courts which have declared the Act to have "the effect of confirming" the general common law rule.

By way of history, the Brief relates to Huberich's treatise on Trading with the Enemy Act (p.188) according to which "the Act neither authorizes nor nor forbids the institution or prosecution of suits or actions at law or in equity, but leaves this to determination according to existing law."

Further reference is made to a review of Huberich's treatise by Charles Warren, who as Assitant Attorney General was the primary draftsman of the Act (12 American Journal of International Law 676,677)

"The Trading with the Enemy Act, of October 6, 1917 ***was intended to supplement the previous law as developed by judicial decision; in some directions it was designed to change the previous law; but it was not designed to codify the whole law upon the subject, and it specifically provided that the common law should govern in all matters not within the scope of its enactment. It left, therefore, many topics to be determined very largely by the common law or by State laws then in force***

In its final conclusions the Brief remains neutral on the question of supremacy of the common law for the reason that "(I)inasmuch as the same conclusion is reached whatever the theory, the courts have not felt compelled to make choice. The decisions almost always refer both to the statute and to the common law cases, differing only in the emphasis which they give one or the other, and are not too explicit as to the relation of the statute to the common law." A much more definite position on the superiority of federal common law was taken by the Supreme Court in Ex Parte Kumazo Kawato supra pp. 74, 75 by pronouncing: "the sound principle of commo law today" pursuant to which, where".....the public welfare demands that his alien shall not receive....payment.....the government can make the decision without allowing a windfall...." The present consequences of the superiority of common law are these:

- (1) A claim based upon equity cannot be impaired by the Trading with the Enemy Act of all. The Act is subject to the law of equity.
- (2) If the Attorney General had totally dismissed Dwyer's claim for return of the vested property, plaintiff would have had a valid claim under the law of equity to get the property returned by reason of Dwyer's equitable disability. Although the United States could have asserted immunity as far as ligigation goes, the government was required by the law of equity administratively to recognize and to give effect to a constructive trust in favor of plaintiff.

The foregoing conceptionally precludes any loss of "standing" on the part of plaintiff wit' respect of the within action as well as any dismissal of the action on the merits.

1126a

POINT V. Even if claim preclusion/res judicata should

technically apply it would be overcome by the

fact that constructive fraud was not realistically

litigated in Action No. 1.

As appears from plaintiff's motion under FRCP 60(b) in Action No. 1 he found an ambiguity in the judgment as to whether or not an action for equitable fraud and the post-vesting effects of the assertion of a constructive trust were adjudicated by the judgment. An interpretation of the judgment to the effect that it exclusively adjudicated actual fraud so as to make it either null and void or at least non-final was suggested by the definition of the burden of proof which the plaintiff, according to the judgment, had failed to sustain. In his disposition of the motions

under FRCP 60 (b), No. 1 specifically dealt with consequences of a ''doubt'' of the plaintiff as to res judicata consequences which are necessarily connected with the problem as to what was adjudicated.

In any event, plaintif respectfully urges that an invisible adjudication of a constructive fraud action by the judgment was not a realistic adjudication. Neither was that claim realistically litigated in Action No. 1, due to the impact of the tentative opinion of the court in favor of an action for fraud and deceit. We consequently are here confronted with a "reasonable doubt as to what was decided in the first action" in conformity with the practice established under McNellis v. First Federal Sav. & L. Ass'n. of Rochester, N. Y. 364 F 2d)

In that case the theory which the aggrieved party did not consider to have been decided "focussed almost entirely on (other) aspects". (p. 256).

In the instant case such condition applies without the qualifying limitation of "almost". There is absolutely nothing in the Opinion which could directly or indirectly be apt to forster the thought that in addition to the action for actual fraud of conspiracy discussed, there could additionally be an action for equitable fraud be under scrutiny.

In this respect the Court of Appeals noted "Finally, although the principles cares judicata should not be frugally applied, cf. United States v. Munsingwaer Inc. 340 U.S. 36, 38, 71 S.Ct. 104, 95 L.Ed. 36 (1950), a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue."

CONCLUSION

It is urged that plaintiff's motion for summary judgment should be granted.

Respectfully submitted,
Werner Galleski
Attorney for Plaintiff
450 Park Avenue
New York, New York, 10022 (phone 371 9040)

Berg & Duffy Counsel to Plaintiff 3000 March Avenue Lake Success, New York, 11040



duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

WERNER GALLESKI

Attorney for

Office and Post Office Address

450 Park Avenue

NEW YORK, N. Y. 10022

Attorney(s) for

NOTICE OF SETTLEMENT

Sh -Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the

day of

M

Dated,

Yours, etc.,

WERNER GALLESKI

Attorney for

Office and Post Office Address

450 Park Avenue NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 76 Civ. 499 Year 19

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against-

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant.

NOTICE OF MOTION and AFFIDAVIT

WERNER GALLESKI

Attorney for

Plaintiff

Office and Post Office Address, Telephone

450 Park Avenue NEW YORK, N. Y. 10022 (212) 371-9040

To

Attorney(s) for

Service of a copy of the within

is horoby admirted.

Dated,

Attorney(s) for

Motion denied as to prayer for relief demanded in paragraphs (a), (b) and (d); granted as to relief demanded in paragraph (c). The clerk is directed to enter judgment dismissing the complaint in this case in accordance with the memorandum and order dated. March 12, 1974.

Signed as the Part I

who is le

30 ORDERED

ALTI LOVO

007

ENDORSED

ORDER

1129a

JUDGMENT OF KNAPP, D.J., ON MAY 11, 1976 DISMISSING COMPLAINT

UNITED STATES DISTRICT COURT

KURT SCHMIEDER

Plaintiff

76 Civil 499 (WK)

-against-

LOUIS H. HALL, JR., as Executor of

JUDGHENT

the Estate of HEILEN B. DWYER

Defendant

Defendant having moved the Court to dismiss on the grounds of res judicata, and the said motion having come on to be heard before the Honorable Whitman Knapp, United States District Judge, and the Court thereafter on March 15, 1976, having handed down its memorandum opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendant LOUIS H. HALL, JR., as Erecutor of the Estate of Helen B. Dwyer, have judgment against plaintiff KURT SCHMI ADEA, dismissing the complaint on the grounds of res judicata.

Dated: New York, N.Y. May 11, 1976

Raymond & Branghards

KURI CHMIEDER,
Plaintiff- Appellant,

- against -

LOUIS H. HALL, as executor of the estate of Helen B. Dwyer, deceased, Definedant-Appellee, Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

\$5.:

I, Victor Ortega,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the

21

day of June

1976

at 1) 1290 Avenue of Americas, New York, New York

2) 60 East 42nd Street, New York, New York

Exhibit Vol.

deponent served the annexed Appendix

1) A Martin Obermaier & Morvillo

2) Truchin & Topper
the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 21 day of June 19 76

ROBERT T. BRIN
MOTARY FUBLIC, State of New York
No. 31 - 0418950
Qualitied in New York County
Commission Expires March 30, 1977

VICTOR ORTEGA